Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL HARRIS,
Petitioner,

v.

RADIO-ELECTRONICS OFFICERS UNION, and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI
***and* APPENDIX**

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QUESTIONS PRESENTED FOR REVIEW

Where a union operates an exclusive hiring hall pursuant to union rules and a bylaw that are explicitly incorporated in its collective-bargaining agreements with employers; and the union removes from its lists of workers to be referred for employment an individual who has not remained "in good standing" with the union by not paying his union-membership dues on time; and the union takes this action without first providing the individual with advance, personal notice of and a reasonable opportunity to cure any actual delinquency in dues—

I. Does the hiring-hall arrangement constitute a "closed shop" illegal under §§ 8(a)(3), 8(b)(1)(A), and 8(b)(2) of the National Labor Relations Act?

II. Although it operates as a "closed shop", is the hiring-hall arrangement permissible under the National Labor Relations Act simply because the union refuses to refer for employment *all* individuals who are supposedly delinquent in payment of union-membership dues?

III. Although it operates as a "closed shop", is the hiring-hall arrangement nevertheless not a " 'union-security' agreement" under §§ 8(a)(3) and 8(b)(2) of the National Labor Relations Act, simply because there is no separate " 'union-security' clause" denominated as such in the collective-bargaining agreements, and notwithstanding that the union's hiring rules and applicable bylaw are explicitly incorporated in those agreements?

IV. If the hiring-hall arrangement constitutes a " 'union-security' agreement" permissible under §§ 8(a)(3), 8(b)(1)(A), and 8(b)(2) of the National Labor Relations Act, is the union required to provide an individual with advance, personal notice of and an opportunity to cure any delinquency in payment of union-membership dues before removing his name from the lists of workers to be referred for employment?

V. If the hiring-hall arrangement is neither an illegal "closed shop" nor a "'union-security' agreement permissible under §§ 8(a)(3), 8(b)(1)(A), and 8(b)(2) of the National Labor Relations Act, does the union act "arbitrarily" under § 8(b)(1)(A) by refusing to provide an individual with advance, personal notice of and an opportunity to cure any delinquency in payment of union-membership dues before removing his name from the lists of workers to be referred for employment?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties in the Court of Appeals for the District of Columbia Circuit included the Radio-Electronics Officers Union ("Union"), the National Labor Relations Board ("NLRB"), petitioner Michael Harris ("Harris"), and Harry Dunleavy.*

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* Harris (but not Dunleavy) intervened in the appeal after the Court of Appeals issued its decision. *See post*, p. 1 n.1.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Rules 12 through 14 of the Rules of this Court, Michael Harris petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

DECISIONS BELOW

The decision of the Court of Appeals is reported at 16 F.3d 1280, and reproduced in the Appendix hereto ("App.") at 1a. The decisions of the NLRB and its Administrative Law Judge ("ALJ") are reported at 306 N.L.R.B. 43 and 45, respectively, and reproduced in App. at 15a and 21a.

JURISDICTION

The Court of Appeals entered the judgment of which Harris seeks review on 4 March 1994. Harris, who was not then a party, petitioned for leave to intervene and for rehearing and rehearing *en banc*. On 12 May 1994, the Court of Appeals granted Harris' petition to intervene, and denied his petitions for rehearing and rehearing *en banc*.[1] On 13 May 1994, Mr. Chief Justice Rehnquist granted Harris' motion to extend the time for filing of this petition to 2 July 1994.[2] Harris has filed within 90 days of the Court of Appeals' denial of his petition for rehearing, and prior to 2 July 1994.[3]

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[1] App. at 47a, 48a.

[2] *Id.* at 49a. *See* Supreme Court Rule 13.2. Harris filed this motion to protect against the possibility that the Court of Appeals would not act on his motion to intervene prior to 2 June 1994, the date on which a petition for a writ of certiorari would otherwise have had to have been filed.

[3] *See* Supreme Court Rules 13.1, 13.2, 13.4.

Jurisdiction lies under 28 U.S.C. § 1254(1).[4]

STATUTORY PROVISIONS INVOLVED

This petition involves Sections 7, 8(a)(3), 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157, 158(a)(3), 158(b)(1)(A) and 158(b)(2). The text of these provisions appears in App. at 50a.

STATEMENT OF THE CASE

I. The Operative Facts. The Union is a national labor organization that represents radio officers and others who work on ocean-going vessels.[5] The Union and various employer-associations and employers are parties to collective-bargaining agreements providing that the Union, through its hiring hall, is the "*sole and exclusive source of referrals of radio officers to employment* with the various employers".[6] Union members and nonmembers use the hiring hall.[7]

The hiring hall is governed by "shipping rules, *which* * * * *are made part of the collective-bargaining agreements*" and "are incorporated into the bylaws of the Union".[8] These rules establish the "national shipping list" and the "on-hand lists". The national

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[4] *See also* National Labor Relations Act §§ 10(e) and 10(f), 29 U.S.C. §§ 160(e) and 160(f).

[5] 306 N.L.R.B. at 43, 45; 16 F.3d at 1281, *in* App. at 16a-17a, 23a; 2a.

[6] 306 N.L.R.B. at 45, *in* App. at 23a (decision of ALJ) (emphasis supplied). *See id.* at 43; 16 F.3d at 1281, *in* App. at 17a; 2a. The NLRB affirmed the ALJ's findings of fact. 306 N.L.R.B. at 43, *in* App. at 15a-16a. The Court of Appeals did not claim that any of these findings lacked substantial evidence in the record. *See* NLRA § 10(e), 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951).

[7] 306 N.L.R.B. at 43; 16 F.3d at 1281, *in* App. at 16a-17a; 2a.

[8] 306 N.L.R.B. at 45, *in* App. at 23a (emphasis supplied).

shipping list ranks users of the hiring hall for referral. Individuals using the hiring hall must submit a written request to be placed on the national shipping list, and on the Atlantic, Gulf, or Pacific on-hand list. Inclusion on the national shipping list is a necessary precondition for placement on the on-hand lists. The on-hand lists for each area are used to dispatch individuals to work-assignments.[9]

Specifically with respect to the national shipping list, the shipping rules provide in relevant part that:

> SECTION 1. A member must be in good standing to be placed on the National Shipping List, and must remain so to continue his employment. Non-members must pay the current quarterly service fee to be placed on the National Shipping List and must continue to pay the quarterly service fee during the period of their employment.
>
> * * *
>
> SECTION 3. The National Shipping List will be updated monthly on the first business day of each month.[10]

Michael Harris was a longtime member of the Union who had utilized the hiring hall from time to time. In a letter the Union received on 19 March 1988, Harris requested the Union to place him on the Atlantic Coast on-hand list. The Union complied.[11]

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[9] 306 N.L.R.B. at 43, 45-46 & n.5; 16 F.3d at 1281-82, *in* App. at 17a, 23a-24a & n.5; 2a.

[10] 306 N.L.R.B. at 45; 16 F.3d at 1281, *in* App. at 24a; 2a. The Union did not establish that the $75 in "dues" Harris failed to pay to remain "in good standing" were no more than the "service fee" it charged nonmembers. *See* 306 N.L.R.B. at 46, *in* App. at 26a. Neither did the Union establish that either the "dues" or the "service fee" reflected only its costs of operating the hiring hall. *See Pittsburgh Press Co. v. NLRB*, 977 F.2d 652, 655-62 (D.C. Cir. 1992); *NLRB v. Local 138, Operating Engineers*, 385 F.2d 874, 876-78 (2d Cir. 1967). The NLRB and the Court of Appeals presumed (as should this Court) that the "dues" were full union-membership dues, in no way tied to a specific "fee".

[11] 306 N.L.R.B. at 43, 46; 16 F.3d at 1282, *in* App. at 17a, 25a-26a; 3a.

At that time, the Union's bylaws required members to pay dues for the upcoming quarter at the end of the current one. Members who failed to pay their dues on time were automatically stricken from the job-referral lists without advance notice. During the preceding year, the Union had sent Harris and other members monthly newsletters, three of which stated that under the shipping rules they had to remain in "good standing" with the Union in order to remain on the shipping list. For example, the April 1987 newsletter stated:

> NINE MEMBERS WERE DROPPED FROM THE APRIL NATIONAL SHIPPING LIST FOR NON-PAYMENT OF DUES. MEMBERS ARE REQUIRED TO BE IN GOOD STANDING TO GET ON THE LIST. AND THEY ARE REQUIRED TO BE IN GOOD STANDING TO STAY ON THE LIST. THE COMPUTER IS MERCILESS, AND EVEN IF YOU ARE NUMBER 1 WHEN YOU GET BEHIND IN PAYMENT OF DUES, YOU WILL BE DROPPED FROM THE LIST IMMEDIATELY. THE BEST WAY TO AVOID THIS IS TO PAY BY THE YEAR.[12]

Harris failed to pay his second-quarter dues by 1 April 1988.[13] On that date, the Union's computer automatically removed Harris from the national shipping list, and sent him a letter notifying him of this action after it had taken effect. The Union provided Harris with neither an individualized advance notice of his delinquency nor an opportunity to cure it before removing him from the list. As a result of the Union's action, Harris was no longer eligible for placement on the on-hand lists or for referral to jobs through the hiring hall.[14]

On 6 June 1988, Harris filed an unfair-labor-practice charge, contending that the union's failure to provide him with notice of and an opportunity to cure his delinquency before striking his name

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[12] 306 N.L.R.B. at 46-47; 16 F.3d at 1281, *in* App. at 27a; 3a.

[13] The record does not indicate the reason for Harris' nonpayment.

[14] 306 N.L.R.B. at 43, 46-47; 16 F.3d at 1281, *in* App. at 17a, 26a-27a; 3a.

from the national shipping list violated NLRA §§ 8(b)(1)(A) and 8(b)(2).[15]

On or about 30 November 1988, the Union adopted a new bylaw providing that

> [d]ues are required to be received by the Union at least fifteen days prior to the end of each calendar quarter and timely receipt of payment of dues * * * shall be required in order to permit registration or continuation of registration on appropriate shipping lists.[16]

"[E]mployers that were parties to collective-bargaining agreements with the Union consented to the [new bylaw]" which was "incorporated into the applicable collective-bargaining agreements".[17] Under the new bylaw, the Union sent written notices to delinquent members 15 days or less before the beginning of the new quarter. The notices warned the members of their delinquencies and that the Union would delete their names from the job-referral lists unless they paid. However, the Union did not send the warnings sufficiently in advance of the due-date to enable the members to cure their delinquencies.[18]

On 6 December 1988, Harris filed a second unfair-labor-practice charge, contending that the new bylaw also failed to provide sufficient notice.[19]

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[15] *See* 16 F.3d at 1282, *in* App. at 3a.

[16] 306 N.L.R.B. at 43, 48; 16 F.3d at 1282, *in* App. at 17a-18a, 31a; 4a.

[17] 306 N.L.R.B. at 48, *in* App. at 31a.

[18] *Id.* at 43-44, 48-49; 16 F.3d at 1282, *in* App. at 18a, 33a; 4a.

[19] 16 F.3d at 1282, *in* App. at 4a.

II. The Decision of the Administrative Law Judge. An Administrative Law Judge ("ALJ") held that the Union had violated NLRA §§ 8(b)(1)(A) and 8(b)(2).

The ALJ acknowledged that " 'a valid union-security clause can be enforced at the hiring hall level by refusal to refer an employee whose dues are in arrears' ", but ruled that

> a union may not lawfully remove users of its hiring hall from its exclusive referral lists without first (1) advising the users they are in arrears on their dues, (2) advising the users of the amounts owed and how the amounts were arrived at, and (3) giv[ing] the users a reasonable time to take corrective actions to remain on the exclusive referral lists. Anything less * * * will not relieve a union of its fiduciary obligations.[20]

The ALJ "reject[ed] the Union's contention that the generalized notice it provided in its monthly newsletters taken in conjunction with its assertion [that] its shipping rules were well known was sufficient to satisfy it[s] fiduciary duty to members and others utilizing its hiring hall".[21] The ALJ recognized that the Union, "through its computerized action, has been 'merciless' in removing anyone from its national shipping list [who] was in arrears on dues", but denied that this policy

> meet[s] the issue of affording the users of its hiring hall * * * an opportunity to clear up any delinquencies before being removed from its lists. * * * [T]hat the Union treated everyone the same with respect to removing them from its national shipping list for any delinquencies does not insulate it from the fiduciary duty it owes the users of its exclusive hiring hall * * * .[22]

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[20] 306 N.L.R.B. at 47, *in* App. at 28a, 29a.

[21] *Id.*, *in* App. at 29a.

[22] *Id.*, *in* App. at 29a-30a.

Finally, the ALJ found that the Union's new bylaw was unlawful as applied, in that the Union did not "allow[ ] delinquent dues payers or users of its hiring hall * * * a reasonable time to correct dues or fees deficiencies before removing such users from its shipping lists".[23]

The ALJ ordered the Union to cease and desist from removing Harris' name from the shipping lists "for failure to remain current in his dues without first informing him of his failure and the specifics related thereto, and without affording him a reasonable opportunity to meet his obligations".[24]

III. The Decision of the National Labor Relations Board. The NLRB affirmed the ALJ under NLRA § 8(b)(1)(A). The NLRB claimed that "[t]here is no evidence of a union-security clause" in the case.[25] Nevertheless, it held that,

> as the operator of an exclusive hiring hall, the [Union] owes a duty of fair representation to applicants using that hall. As part of its duty of fair representation, the [Union] has an obligation to operate the exclusive hiring hall in a manner that is not "arbitrary or unfair." * * * [W]henever a union prevents an employee from being hired, it demonstrates its power and influence over his livelihood so dramatically as to compel an inference that the effect of the union's action is to encourage union membership on the part of all employees who have perceived the display of power. A union may overcome that inference, however, either by acting pursuant to a valid union-security clause or by showing that its action was necessary to

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[23] *Id.* at 48-49, *in* App. at 33a.

[24] *Id.* at 52, *in* App. at 44a-45a.

[25] Harris uses the verb "claimed", as the record conclusively establishes that: (i) the Union's shipping rules and amended bylaw *are* incorporated into its collective-bargaining agreements; and (ii) these rules and bylaw amount in operation and effect to a " 'union-security' clause"—indeed, a "closed shop". *See post*, pp. 11-14.

> the performance of its representative function. The [Union] has failed to overcome that inference.

The NLRB therefore held that the Union "acted arbitrarily and unfairly by removing Harris from the national shipping list".[26]

The NLRB rejected the argument that the Union "gave Harris notice of his dues obligation by setting forth the requirement in its bylaws and by occasionally mentioning it in monthly newsletters". Rather, the NLRB held, "in light of its obligation to operate the hiring hall fairly and impartially the [Union] was obligated to give Harris specific notice of his particular financial deficiency before taking action that would be detrimental to Harris' employment opportunities".[27]

With respect to the new bylaw, the NLRB held that the Union "has not afforded applicants who are in arrears on dues or fees a reasonable time to make these payments".[28]

IV. The Decision of the Court of Appeals. Upon the Union's petition for review and the NLRB's cross-application for enforcement of its order, the Court of Appeals reversed the NLRB and denied enforcement.

The Court acknowledged that NLRA §§ 8(a)(3) and 8(b)(2) " 'were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood' ", and that "a presumption of illegality arises whenever an employee loses * * * a hiring opportunity as a result of a union's conduct". To rebut this presumption, the Court explained, "the union must show either that its action was taken pursuant to a valid union security clause, or that it 'was necessary to the effective performance of its

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[26] 306 N.L.R.B. at 44, *in* App. at 19a (footnotes omitted).

[27] *Id.*, *in* App. at 19a-20a.

[28] *Id.*, *in* App. at 20a.

function of representing its constituency' ". Here, "[b]ecause the [NLRB] found that the Union's collective bargaining agreements did not contain any union security clauses, the 'necessity' defense is the key to this case".[29]

The Court noted that the necessity defense "is not limited to actions taken pursuant to a collective bargaining agreement", but "also embraces those that enforce union administrative rules that are neutral, clearly established, and consistently applied".[30] Thus, "in the context of a statute that bars discrimination, the 'necessity defense' requires a union to establish that it acted pursuant to a concrete standard—be it * * * a written union rule, or a long-standing practice".[31]

The Court ruled that the Union had established a necessity defense, because: (i) "Harris's automatic delisting for failure to pay dues was required by the Union's established hiring hall rules", which were "uniformly applied"; and (ii) "it [is] reasonable to infer that Harris was aware of this practice".[32]

The Court rejected the NLRB's requirement that the Union "provide Harris with explicit notice of the consequences of his delinquency together with the opportunity to take corrective action

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[29] 16 F.3d at 1284, *in* App. at 7a, 8a (citations omitted). Although both the NLRB and the ALJ relied upon NLRA § 8(b)(1)(A), the Court of Appeals did not refer to this section in its substantive analysis.

[30] 16 F.3d at 1284, *in* App. at 8a.

[31] *Id.* at 1285, *in* App. at 9a.

[32] *Id.*, *in* App. at 10a. The Court did not suggest that Harris' "awareness" came from a specific Union notice directed to him, but argued that, although "the shipping rules did not state explicitly that any radio officer who failed to pay his dues * * * on time would be dropped from the list, no one questions (and the monthly newsletters confirmed) that this was the automatic effect of any delinquency. We find it hard to believe that a seasoned mariner who depended on the hiring hall for his livelihood was oblivious of the consequences of failing to pay his dues on time". *Id.*

before his name was dropped from the list", because: (i) the precedents supporting the NLRB's position "all involved collective bargaining agreements containing union security clauses"; (ii) "such clauses are strictly regulated because they condition employment on union membership"; (iii) the NLRB "found no evidence of a union security clause in the Union's collective bargaining agreements"; (iv) "the Union's hiring hall was open to non-members as well as members"; and, therefore, (v) "the rationale for a stringent notice standard is absent here".[33]

Harris—who was a charging party before the NLRB, but was not at that point a party in the Court of Appeals—then moved to intervene and petitioned for rehearing and rehearing *en banc*. On 12 May 1994, the Court of Appeals granted Harris' motion to intervene, and denied his petitions for rehearing and rehearing *en banc*.[34]

This petition followed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This Court should grant Harris' petition because the Court of Appeals (i) has decided an important question of federal labor law this Court reserved in *Breininger v. Local No. 6, Sheet Metal Workers*[35] and should now resolve; and (ii) has decided a question of federal labor law in a way that flies in the face of the settled construction of NLRA §§ 7, 8(a)(3), 8(b)(1)(A), and 8(b)(2), and conflicts with applicable decisions of this Court.[36]

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[33] *Id.* at 1285-86, *in* App. at 11a.

[34] App. at 47a, 48a.

[35] 493 U.S. 67, 85 n.9 (1989).

[36] *See* Supreme Court Rule 10.1(c).

I. This case squarely presents the issue of construction of NLRA §§ 8(b)(1)(A) and 8(b)(2) that this Court reserved in *Breininger v. Local No. 6, Sheet Metal Workers*.

In *Breininger*, this Court recognized that the NLRB has construed NLRA §§ 8(b)(1)(A) and 8(b)(2) "to bar the use of unfair, irrelevant, or invidious considerations in employee referrals of employees". But the Court did "not pass on the wisdom of the [NLRB's] interpretation, because * * * whatever the proper reading of § 8(b), [Breininger] has stated a claim for breach of the duty of fair representation".[37] Here, the Court of Appeals has squarely rejected the NLRB's interpretation of those sections, thus deciding—erroneously, Harris demonstrates below—the question *Breininger* reserved, and that this Court should now take up and answer correctly.

II. This case squarely presents the issue of whether a union may operate what amounts to an *illegal* "closed shop" without even the procedural safeguards the NLRB has determined are necessary for a compulsory-unionism arrangement NLRA § 8(a)(3) allows.

A. Although both the Court of Appeals and the NLRB failed to find a so-called "union-security"—compulsory-unionism—arrangement in this case,[38] the hiring hall *sub judice* is in fact a "closed shop" with respect to Harris, in that:

- The "hiring hall * * * serves as the exclusive source of referrals of radio officers" for employment with employers that are

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[37] 493 U.S. at 85 n.9.

[38] *See* 16 F.3d at 1285; 306 N.L.R.B. at 44, *in* App. at 10a, 19a. The ALJ did not explicitly rule that the Union's shipping-list rule amounts to a " 'union-security' arrangement". But his finding that the rule as applied violates NLRA § 8(b)(2) implicitly so held. *See* 306 N.L.R.B. at 47-48, *in* App. at 30a-31a. *See also id.* at 51, *in* App. at 42a.

signatories to one of the Union's collective-bargaining agreements.[39]

- "[T]he hiring hall * * * is governed by 'National Shipping List Rules' that are incorporated into the collective bargaining agreements".[40] And
- Harris was required to "be in good standing to be placed on the National Shipping List", absent which he could not be and was not referred to (let alone hired by) any employer that is a signatory to one of the collective-bargaining agreements.[41]

The "closed shop" is the most severe form of compulsory-unionism arrangement.[42] It is also *illegal*, and has been since

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[39] 16 F.3d at 1281, *in* App. at 2a. *Accord*, 306 N.L.R.B. at 43, 45, *in* App. at 17a, 23a.

[40] 16 F.3d at 1281, *in* App. at 2a. *Accord*, 306 N.L.R.B. at 45, *in* App. at 23a. *See* 306 N.L.R.B. at 48, *in* App. at 31a (Union's bylaw on payment of dues was "incorporated into the applicable collective-bargaining agreements").

[41] 306 N.L.R.B. at 46, *in* App. at 24a.

[42] As relevant here, compulsory-unionism arrangements fall into five categories:

"*Closed Shop Agreement*: An individual must be a member of the union in order to be eligible for hire and must retain this membership as a condition of continued employment with the contracting employer.

"*Union Shop Agreement*: An individual who is not a member of the union may be hired but within a specified time after hire must become and remain a member as a condition of continued employment with the contracting employer.

"*Maintenance-of-Membership Agreement*: An employee who is a member of the union at the beginning of the contract or who becomes a member during the term of the contract is obligated to remain a member until the termination of the contract.

"*Agency Shop Agreement*: An individual who is not a member of the union may be hired and retained in employment without the necessity of becoming a member of the union, but he is required to tender the equivalent of initiation fees and periodic dues to the union as a condition of his continued employment with the contracting employer.

"*Service Fee Agreement*: An individual who is not a member of the union may be hired and retained in employment without the necessity of becoming a

1947. When Congress amended the NLRA in 1947, "the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop".[43] Today, under NLRA § 8(a)(3)[44] as construed in *Communications Workers v. Beck*, a union and an employer may lawfully impose on employees no more than a "service-fee" requirement as a condition of employment, and may do that only *after*—not as a precondition to—hire.[45]

That the Union struck Harris' name from the shipping lists solely because of his failure to pay his membership-dues does not detract from the "closed-shop" nature of the hiring hall. The often mislabelled "union shop" allowed by NLRA § 8(a)(3) literally requires "membership" in the union 30 days after hire. But under *Beck*, "the 'membership' that may be required has been 'whittled down to its financial core' ".[46] Thus, a union rule (as here, embodied in collective-bargaining agreements and the Union's bylaws) that conditions an individual's hire upon "good standing" in the Union is functionally a "closed shop", even though the only indicium of "membership" the Union enforced against Harris was the requirement to pay "dues" (the "financial core").

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member of the union, but as a condition of employment he is required to tender to the union his pro rata share of the costs incurred by the union in performing its statutory function as the exclusive bargaining representative."

T.R. Haggard, *Compulsory Unionism, the NLRB, and the Courts: A Legal Analysis of Union Security Agreements*, University of Pennsylvania, Industrial Research Unit, Labor Relations and Public Policy Series No. 15 (1977), at 4-5 (footnote omitted).

[43] *NLRB v. General Motors Corp.*, 373 U.S. 734, 740 (1963). *See Communications Workers v. Beck*, 487 U.S. 735, 747-49 (1988).

[44] *See also* NLRA § 8(f), 29 U.S.C. § 158(f).

[45] 487 U.S. 735, 744-63 (1988).

[46] *Id.* at 745, *quoting General Motors Corp.*, 373 U.S. at 742. This "financial core" includes only "the obligation to support union activities * * * germane to collective bargaining, contract administration, and grievance adjustment". *Beck*, 487 U.S. at 745, 762-63.

That the Union's hiring hall operates as a "closed shop" is not surprising. Historically, hiring halls have been "a useful adjunct to the closed shop".[47] Hiring halls "are not illegal *per se*, * * * so long as they are not used to create a closed shop".[48] But where (as here) an illegal "closed shop" does exist, a hiring hall must be scrutinized even more closely than a compulsory-unionism arrangement permissible under NLRA § 8(a)(3).

B. A "closed-shop" arrangement violates NLRA §§ 7, 8(a)(3), 8(b)(1)(A), and 8(b)(2). A union and an employer may not agree to require an individual to satisfy some *pre*-hire indicium of union "membership" as a condition of employment.[49]

1. In the context of a hiring hall operating as a "closed shop", the Court of Appeals' theory that "Harris's automatic delisting for failure to pay dues was required by the Union's established hiring hall rules", that the rules were "uniformly applied", and that "compliance with established, nondiscriminatory hiring hall procedures is a defense to an unfair labor practice charge" lacks any basis in the NLRA.[50]

In compulsory-unionism situations, illegal "discrimination" occurs when an individual is denied hire (the "closed shop") or tenure of employment after hire (compulsory-unionism arrangements less demanding than the "closed shop") because that individual has failed to comply with some unlawful union-"mem-

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[47] *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 672 (1961) (footnote omitted).

[48] *Id.* at 673.

[49] *See, e.g., NLRB v. Local 633, Plumbers*, 424 F.2d 390, 392-93 (6th Cir. 1970); *NLRB v. Local 269, Electrical Workers*, 357 F.2d 51, 55-57 (3d Cir. 1966).

[50] *See* 16 F.3d at 1285, *in* App. at 9a-10a. An exclusive hiring hall that applies nondiscriminatory rules *other than conditioning the use of the hall on pre-hire satisfaction of a union "membership" requirement* would not be a "closed shop" by definition.

bership" requirement; whereas, individuals who have complied are hired or retained in their employment. In a "closed shop", the illegal discrimination occurs between: (i) those who comply with the "membership" requirement, and are hired; and (ii) those who do not comply, and are not hired. That "the Union * * * has been 'merciless' in removing anyone from its national shipping list that was in arrears on dues",[51] does not disprove this discrimination. Rather, it evidences the discrimination's relentless nature. Thus, the computerized perfection of the Union's "closed shop" is no "defense", but the strongest reason for this Court to outlaw it under NLRA §§ 8(b)(1)(A) and 8(b)(2)!

Under a compulsory-unionism arrangement licensed by the provisos to NLRA § 8(a)(3), discrimination is allowed *after* hire for an employee's default in fulfilling his "financial-core" obligations. Any discrimination *before* hire, however, constitutes a "closed shop", which is illegal *per se, semper et ubique*.

2. The Union may avail itself of no "necessity defense" in the operation of a "closed shop". "[T]he 'necessity defense' requires a union to establish that it acted pursuant to a concrete standard" that was "uniformly applied".[52] The "standard" however, must itself be *legal*. The Union's "standard" that Harris satisfy a *pre*-hire "dues" requirement constitutes an illegal "closed shop". *Ergo*, no "necessity defense" can possibly be predicated on that "standard".

3. Furthermore, "that Harris was aware of this practice"—that is, the Union's operation of the hiring hall as a "closed shop" by " 'delet[ing] from the job referral lists without advance notice' " all " '[m]embers who failed to pay their dues by the start of the new quarter' "—is irrelevant.[53] Even explicit, personalized, and timely notice by the Union to Harris (let alone publica-

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[51] 306 N.L.R.B. at 47, *in* App. at 29a-30a.

[52] *See* 16 F.3d at 1285, *in* App. at 9a, 10a.

[53] *Pace id.* at 1287, *in* App. at 10a.

tion in the Union's newsletter[54]) cannot validate a species of the very "closed shop" that Congress found " 'create[d] too great a barrier to free employment to be longer tolerated' ",[55] and therefore "abolish[ed]".[56]

C. In even permitting the Union to enforce its hiring-hall rules only after providing Harris with explicit, personalized, and timely notice of and an opportunity to cure his delinquency in dues, the NLRB acted with consummate leniency.[57] For it applied to the Union's *illegal* "closed shop" the notice-requirements it applies to *legal* compulsory-unionism arrangements under NLRA § 8(a)(3), and without which requirements the operation of the hiring hall would be patently arbitrary and unfair.[58]

The Court of Appeals' decision thus turns the logic of labor law inside-out:

- The "closed shop" intrudes on employees' rights so much more than any other compulsory-unionism arrangement that it has been statutorily *abolished* by Congress.
- The NLRB has held in numerous decisions—never questioned by the courts heretofore—that, under color of a legal compulsory-unionism arrangement, a union may *not* cause an employee to be removed from his job for failure to pay "dues"

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[54] *See id.* at 1282, 1285, *in* App. at 3a, 10a.

[55] *Beck*, 487 U.S. at 748.

[56] *General Motors Corp.*, 373 U.S. at 740.

[57] *See* 306 N.L.R.B. at 44-45, 52-53, *in* App. at 20a-21a, 44a-46a.

[58] *See id.* at 47-48 (decision of ALJ) (*semble*), 44 (decision of the NLRB), *in* App. at 29a-30a, 19a. *See post*, pp. 23-29.

without first affording him notice of and a reasonable opportunity to satisfy the delinquency.[59] Nevertheless,

- The Court of Appeals in effect held that the NLRB's requirements as to legal compulsory-unionism arrangements may not be applied to a hiring hall that operates as an *illegal* "closed shop", because "the rationale for a stringent notice standard is absent" inasmuch as "the [NLRB] found no evidence of a union security clause in the Union's collective bargaining agreements, and the * * * Union's hiring hall was open to non-members as well as members".[60] That is, inasmuch as the Union had *no* legal basis for imposing any compulsory-unionism requirement at all, and inasmuch as it applied its *illegal* "closed-shop" requirements to everyone with the same "merciless" efficiency, the Union acted permissibly!

III. This case squarely presents the issue of what constitutes illegal "discrimination" in the operation of an exclusive union hiring hall that functions as a "closed shop".

The Court of Appeals has injected into the law of compulsory-unionism arrangements a patently erroneous theory of "discrimination" that renders *any de facto* compulsory-unionism scheme in the context of a hiring hall valid, no matter how unlawful the scheme may be, so long as the union and employer enforce it mercilessly.

A. The Court of Appeals reasoned that:

- "[C]ompliance with established, *nondiscriminatory* hiring hall procedures is a defense to an unfair labor practice charge."
- "[I]n the context of a statute that bars *discrimination*, the 'necessity defense' requires a union to establish that it acted pursuant to a concrete standard."

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[59] *E.g., Philadelphia Sheraton Corp.*, 136 N.L.R.B. 888, 896-97 (1962), *enforced sub nom. NLRB v. Local 568, Hotel Employees*, 320 F.2d 254 (3d Cir. 1963).

[60] 16 F.3d at 1286, *in* App. at 11a.

- "Harris's automatic delisting for failure to pay dues was required by the Union's established hiring hall rules"; and "the automatic delisting rule was *uniformly* applied." And, therefore,
- The Union's delisting of Harris was justified under the "necessity defense".[61]

Under the law heretofore universally accepted by the NLRB and the courts, however, "discrimination" illegal under NLRA §§ 8(b)(1)(A) and 8(b)(2) occurs whenever a union causes or attempts to cause an employer not to hire, or not to retain in employment, an individual because that individual has not satisfied some union-"membership" requirement not permitted under the provisos to NLRA § 8(a)(3). The NLRA outlaws "discrimination in regard to hire or tenure of employment * * * to encourage * * * membership in any labor organization".[62] Thus, if the union and the employer "discriminate in regard to hire"—by refusing to hire individuals who have failed to pay the union's "membership dues", but hiring those who have paid—NLRA §§ 8(a)(3), 8(b)(1)(A), and 8(b)(2) have been violated as to the individuals who have not been hired. This is the "closed shop".

A finding of illegal "closed-shop" "discrimination" *never* demands the additional proof that the union also discriminates within the class of individuals not hired—say, by enforcing the rule against some, but not against others. **A union operates an illegal "closed shop" if *only one* individual is not hired because of his failure to meet some *pre*-hire "membership" requirement.**

The Court of Appeals' decision thus writes the long-accepted meaning of NLRA §§ 8(a)(3), 8(b)(1)(A), and 8(b)(2) out of the law. Under the Court's reasoning, a union and an employer need only create *de facto* a *pre*-hire compulsory-unionism arrangement that they pretend is not a formal " 'union-security' agreement" in their collective-bargaining agreement, and enforce that arrangement

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[61] *Id.* at 1285, *in* App. at 9a-10a (emphasis supplied).

[62] NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3).

uniformly, and the scheme becomes permissible—even though, were the scheme formalized in the collective-bargaining agreement, it would be illegal on its face (as are all "closed-shop" schemes).[63]

B. The Court of Appeals' decision thus sets on its head *Local 357, Teamsters v. NLRB*.[64] There, this Court held that the NLRB could not treat a hiring-hall agreement as unlawful *per se* where the agreement "ha[d] a protective clause [eschewing all discrimination] in it, * * * and there [was] no evidence that it was in fact used unlawfully".[65] Here, the Court of Appeals has ruled that the NLRB may not find the Union's hiring hall unlawful as applied, even though the Union's rule explicitly recites that "[a] member must be in good standing to be placed on the National Shipping List", and its latest bylaw recites that timely *pre*-hire payment of "[d]ues * * * shall be required in order to permit registration or continuation of registration [of an individual applicant for employment] on appropriate shipping lists"[66]—that is, *even though the Union's own rule and bylaw mandate discrimination in the hiring process based on Harris' prior noncompliance with the Union's "membership" requirement*.

The Court of Appeals has thus immunized the most virulent form of discrimination that NLRA § 8(a)(3) outlaws, simply because the discrimination arises in the context of a hiring-hall scheme. However, if (as *Local 357, Teamsters* held) hiring-hall arrangements may not be deemed discriminatory *per se* where they contain provisions eschewing discrimination, a parity of logic dictates that hiring-hall arrangements may not be treated as

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[63] Harris, of course, does contend that the Union's hiring-hall rules constitute a " 'union-security' agreement" as the NLRB and the Court of Appeals apparently understand that term. *See post*, pp. 20-23.

[64] 365 U.S. 667 (1961).

[65] *Id.* at 676.

[66] 306 N.L.R.B. at 46, 48, *in* App. at 24a, 31a.

nondiscriminatory *per se* where they contain provisions compelling discrimination with respect to individuals (such as Harris) who have not met *pre*-hire union-"membership" requirements.

IV. This case squarely presents the issue of whether parties to a collective-bargaining agreement can evade a finding that a " 'union-security' arrangement" exists, by the artifice of establishing that arrangement in a document separate from, albeit explicitly incorporated in, a collective-bargaining agreement.

A. Both the NLRB and the Court of Appeals purported to find that the Union and the employers had no " 'union-security' agreement".[67] The Court of Appeals recognized that "such clauses are strictly regulated because they condition employment on union membership", but held that "the rationale for [the NLRB's] stringent notice standard is absent" in the absence of such a clause.[68]

Amazingly, the Court of Appeals did *not* rule that any of the NLRB's factual findings were without substantial evidence in the record. And the NLRB *upheld* the findings of the ALJ.[69] On his part, the ALJ found that the Union and various employers

> are parties to collective-bargaining agreements requiring that the Union be the sole and exclusive source of referrals of radio officers to employment with the various employers. The Union operates its hiring hall under both general and national shipping rules, *which rules are made part of the*

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[67] 16 F.3d at 1286 ("the [NLRB] found no evidence of a union security clause in the Union's collective bargaining agreements"), 1285 (the Union's "collective bargaining agreements did not contain a union security clause"), *in* App. at 11a, 10a.

[68] *Id.* at 1286, *in* App. at 11a.

[69] 306 N.L.R.B. at 43 & n.1, *in* App. at 15a-16a & n.1.

> *collective-bargaining agreements between the Union and various employer-associations as well as other employers.*[70]

Moreover, with respect to the Union's new bylaw, the ALJ found that

> employers that were parties to collective-bargaining agreements with the Union consented to the [bylaw] changes *which changes were incorporated into the applicable collective-bargaining agreements.*[71]

Neither the Court of Appeals nor the NLRB explained how there could be no " 'union-security' agreement" under these circumstances.

B. No rational explanation is possible. There was an "agreement" between the Union and the employers (the collective-bargaining agreements, incorporating the Union's shipping rule and bylaw). In operation and effect, this agreement discriminated between two classes of potential employees: (i) those who had fulfilled a *pre*-hire condition of being "in good standing" with the Union by paying their "dues" prior to referral to a job; and (ii) those who had not fulfilled that condition. Individuals in the latter class (such as Harris) were not referred for employment. The effect of this discrimination is, self-evidently, "to encourage * * * membership in a[ ] labor organization" within NLRA § 8(a)(3). *Ergo*, the agreement is a " 'union-security' agreement".

The agreement was either legal or illegal as to Harris. If it was legal (that is, if it constituted a compulsory-unionism arrangement permissible under NLRA § 8(a)(3)), then the NLRB's "stringent notice standard" was applicable, contrary to the holding of the Court of Appeals; and the Union's failure to give Harris notice of and a reasonable opportunity to cure his deficiency in dues violated

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[70] *Id.* at 45, *in* App. at 23a (emphasis supplied).

[71] *Id.* at 48, *in* App. at 31a (emphasis supplied).

NLRA §§ 8(b)(1)(A) and 8(b)(2). If the agreement was not legal (that is, if it constituted a "closed shop"), then the Union's discrimination against Harris was impermissible *per se*, whether it provided notice to him or not.

C. The decisions of both the Court of Appeals and the NLRB open a yawning chasm in the jurisprudence of NLRA §§ 8(a)(3), 8(b)(1)(A), and 8(b)(2).

Those sections outlaw *any* "discrimination in regard to hire * * * to encourage * * * membership in a labor organization", except where the union and the employer have "an agreement" mandating payment of a "service fee" after the employee's hire.[72] And, under the case-law, even a valid agreement of this type must meet the NLRB's "stringent notice standard", as an added protection for employees.[73]

Here, however, the Court of Appeals has decreed that *neither* an "agreement" *nor* the "stringent notice standard" need obtain for the Union to enforce what amounts to an *illegal* "closed shop". Thus, in contradistinction to NLRA § 8(a)(3)—which allows only *post*-hire discrimination under carefully controlled conditions, and which the NLRB allows a union to implement only with "stringent" procedural protections—the Court of Appeals' decision broadly licenses *pre*-hire discrimination *without any statutory conditions or procedural protections*.

Moreover, the Court of Appeals and the NLRB have created an open-ended exception to NLRA §§ 8(a)(3) and 8(b)(2), by ruling that no " 'union-security' agreement" exists unless it is an explicit part of a collective-bargaining agreement. Section 8(a)(3) does refer to "an agreement" that licenses *post*-hire discrimination against employees on the basis of union "membership". The sec-

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[72] *Compare* NLRA §§ 8(a)(3) and 8(f), 29 U.S.C. §§ 158(a)(3) and 158(f), *with Beck*, 487 U.S. at 745, 762-63.

[73] *See ante*, note 59 and accompanying text.

tion does *not* require, however, that this "agreement" be an explicit term of a collective-bargaining agreement.[74] In any event, here the Union and the employers *incorporated* the shipping-list rules and the Union's new bylaw into the applicable collective-bargaining agreements. If the Court of Appeals' theory is allowed to stand, unions and employers can immunize themselves against their own violations of NLRA §§ 8(a)(3) and 8(b)(2) by the mere drafting trick of setting up their illegal " 'union-security' arrangements" in documents physically separate from their collective-bargaining agreements.

V. This case squarely presents the issue of whether "arbitrary" conduct by a union in the administration of a hiring hall violates NLRA § 8(b)(1)(A).

A. In finding that the Union had violated NLRA § 8(b)(1)(A), the NLRB explained that, "as the operator of an exclusive hiring hall, the [Union] owes a duty of fair representation to applicants using that hall".[75] Further, the NLRB noted, "[a]s part of its duty of fair representation, the [Union] has an obligation to operate the exclusive hiring hall in a manner that is not 'arbitrary or unfair' ".[76] The NLRB then held that

> the [Union] has not shown that removing Harris from the national shipping list *in the manner it did* was *necessary* to the effective performance of its representative function.

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[74] NLRA § 8(d) only requires "the execution of a written contract incorporating any agreement reached *if requested by either party*". 29 U.S.C. § 158(d) (emphasis supplied).

[75] 306 N.L.R.B. at 44, *in* App. at 19a, *citing Breininger v. Local No. 6, Sheet Metal Workers*, 493 U.S. 67 (1989).

[76] 306 N.L.R.B. at 44, *in* App. at 19a, *citing Miranda Fuel Co.*, 140 N.L.R.B. 181, 184 (1962). *Miranda Fuel* established that a breach of the duty of fair representation is also an unfair labor practice, and that the NLRB would apply that duty in the unfair-labor-practice context as it had been developed by the federal courts. 140 N.L.R.B. at 184-86, *explained in Vaca v. Sipes*, 386 U.S. 171, 181 (1967).

> * * * [I]n light of its obligation to operate the hiring hall fairly and impartially the [Union] was obligated to give Harris specific notice of his particular financial deficiency before taking action that would be detrimental to Harris' employment opportunities. Further, regarding the application of the [Union's] November 1988 rules revision, * * * the [Union] has not afforded applicants who are in arrears on dues * * * a reasonable time to make these payments.[77]

The Court of Appeals did not challenge the NLRB's finding that the Union had not shown that "removing Harris from the national shipping list *in the manner it did* was *necessary* to the effective performance of [the Union's] representative function". Neither did the Court challenge the NLRB's conclusion that the Union's failure "to give Harris specific notice" was arbitrary and unfair under the circumstances. Rather, the Court ruled that the Union had made out a "necessity defense" simply by showing its "compliance with established, *nondiscriminatory* hiring hall procedures".[78]

Thus, the Court of Appeals implicitly denied that "arbitrary" conduct by a union in the administration of a hiring hall constitutes an unfair labor practice under NLRA § 8(b)(1)(A).

B. "Arbitrary" conduct by a union in the administration of a hiring hall constitutes a violation of the union's duty of fair representation ("DFR"). In *Breininger*, this Court rejected the argument that, "because in the hiring hall setting a union is acting essentially as an employer in matching up job requests with available personnel", the union has no DFR at all.[79] "Only because of its status as a[n NLRB]-certified bargaining representa-

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[77] 306 N.L.R.B. at 44, *in* App. at 19a, 20a (emphasis supplied).

[78] 16 F.3d at 1285, *in* App. at 9a (emphasis supplied).

[79] 493 U.S. at 87. In so doing, *Breininger* implicitly approved several decisions of the NLRB on that point. *Id.* at 87 n.11.

tive and by virtue of the power granted to it by the collective-bargaining agreement", the Court explained,

> does a union gain the ability to refer workers for employment through a hiring hall. Together with this authority comes the responsibility to exercise it in a ***nonarbitrary and*** nondiscriminatory fashion. * * *
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> * * *
>
> The union's assumption in the hiring hall of * * * an "employer's" role in no way renders the duty of fair representation inapplicable. When management administers job rights outside the hiring hall setting, ***arbitrary or*** discriminatory acts are apt to provoke a strong reaction through the grievance mechanism. In the union hiring hall, however, there is no balance of power. If * * * in a hiring hall the union has assumed the mantle of employer, then the individual employee stands alone against a single entity: the joint union/employer. ***An improperly functioning hiring hall thus resembles a closed shop, " 'with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union.' "*** In sum, if a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power ***fairly*** *increases* rather than *decreases*. That has been the logic of our duty of fair representation cases since *Steele v. Louisville & Nashville R. Co.*, 323 U.S. at 200.[80]

Thus, *Breininger* squarely held that *arbitrary* and *unfair* (as well as discriminatory) union conduct in the administration of a hiring hall violates the DFR.[81]

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[80] *Id.* at 87-89 (***bold-face*** emphasis supplied), *citing Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

[81] In *Breininger*, the hiring hall was not the exclusive source of employment for affected workers. 493 U.S. at 71. Thus, the principles of *Breininger* apply with special force here, where the Union was administering an *exclusive* hiring hall. 16 F.3d at 1281; 306 N.L.R.B. at 43, 45, *in* App. at 2a; 16a, 23a.

C.1. The NLRB correctly equated a DFR violation with a violation of NLRA § 8(b)(1)(A) in the hiring-hall context, because (as *Breininger* emphasized) "[a]n improperly functioning hiring hall * * * resembles a closed shop"; and a "closed shop" is an unfair labor practice under NLRA §§ 8(a)(3), 8(b)(1)(A), and 8(b)(2).[82] Although there may be circumstances in which the DFR and unfair labor practices are not mirror images,[83] where this Court has held that (as a generality) "arbitrary" union conduct in the administration of a hiring hall violates the DFR, and where improper administration of a hiring hall results in a "closed shop", the NLRB correctly treats such "arbitrary" conduct as an unfair labor practice. Moreover, if "arbitrary" union conduct does result in a "closed shop", then that conduct also causes the type of "discrimination" cognizable as an unfair labor practice under NLRA §§ 8(a)(3) and 8(b)(2).

The Court of Appeals' decision disregards the teaching and necessary implications of *Breininger*, and thereby creates an unjustifiable dichotomy between DFR and unfair-labor-practice jurisprudence where hiring halls are concerned: to wit, hiring halls may not be administered arbitrarily or discriminatorily under the DFR (*Breininger*), but may be administered arbitrarily under NLRA § 8(b)(1)(A) (the Court of Appeals). Predictably, this dichotomy will generate mounting conflict and confusion as two parallel but irreconcilable strands of case-law are spun out of the inferior federal courts and the NLRB—unless this Court intervenes. Moreover, this dichotomy will force individuals aggrieved by "closed-shop" practices in the hiring-hall context to eschew the simple administrative procedures of NLRB enforcement of the NLRA, and instead bring their complaints as DFR suits in the federal courts, thereby unnecessarily adding to the litigation-expenses of the parties and the work-load of the courts.

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[82] *See Breininger*, 493 U.S. at 89.

[83] *Id.* at 86-87.

2. The NLRB also correctly held that NLRA § 8(b)(1)(A) requires the Union to provide Harris with certain *procedural* protections. As *Breininger* explained, "if a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly *increases* rather than *decreases*. That has been the logic of our duty of fair representation cases since *Steele*".[84] *Steele* made clear that the DFR requires a union to provide employees with *procedural due process* in the administration of collective-bargaining agreements.[85] A union, *Steele* explained, must represent all employees "without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required * * * to give [employees] notice of and opportunity for hearing upon its proposed action".[86]

Thus, the general standard under the DFR is "notice" and opportunity for a "hearing". The NLRB required just that here, under NLRA § 8(b)(1)(A)—that the Union provide Harris with "specific notice of his particular financial deficiency before taking action that would be detrimental to Harris' employment opportunities", and afford him "a reasonable time to make these payments".[87] These requirements are hardly novel in the general jurisprudence of procedural due process.[88]

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[84] *Id.* at 89.

[85] The term "procedural due process" is appropriate, because *Steele* devised the DFR in order to avoid the serious *constitutional* problems that exclusive representation raises. *See* 323 U.S. at 198-99, 202 (opinion of the Court), 208 (Murphy, J., concurring).

[86] *Id.* at 204.

[87] 306 N.L.R.B. at 44, 52, *in* App. at 20a, 45a.

[88] *Notice*: *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). *Hearing*: *Armstrong*, 380 U.S. at 552; *see Goldberg v. Kelly*, 397 U.S. 254, 266-68 (1970), *and Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

3. Finally, the NLRB correctly rejected the Union's "necessity defense", because the Union never "show[ed] that removing Harris from the national shipping list *in the manner it did* was *necessary* to the effective performance of its representative function".[89]

The Union's rule—and the action it took against Harris under color thereof—were clearly arbitrary. For example, an individual's mere knowledge of the rule possibly gleaned from Union newsletters (on which the Court of Appeals focussed[90]) does not imply that he is on notice of a delinquency in his own payment of dues. The individual may have inadvertently failed to mail his check, the check may have been delayed or lost in the postal service, the payment may not have been properly credited in the Union's computer, and so on.[91] Or, an individual's failure to pay full union-membership "dues" may reflect his opposition to the Union's claim for more money than it is entitled to charge for operation of the hiring hall,[92] or some other legal claim.

Moreover, even if the individual has no "defense" for his failure to pay, he nevertheless has an *absolute* right to procedural

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[89] 306 N.L.R.B. at 44, *in* App. at 19a (emphasis supplied). The Court of Appeals did not question this finding. Rather, the Court simply noted that the Union had "uniformly applied" its rule. It never explained how the rule was "necessary" to the Union's "representative function". *See* 16 F.3d at 1285, *in* App. at 10a.

[90] *See* 16 F.3d at 1285, *in* App. at 10a. The NLRB correctly rejected "such general notification of the dues requirement" as "insufficient". 306 N.L.R.B. at 44, 47, *in* App. at 19a-20a, 29a.

[91] The record contains no explanation of why Harris' second-quarter dues were not paid on time.

[92] *Compare Beck*, 487 U.S. at 745, 762-63 (maximum amount chargeable as service fee under NLRA § 8(a)(3) is *pro rata* share of union's costs of collective bargaining), *with NLRB v. Local 138, Operating Engineers*, 385 F.2d 874, 876-78 (2d Cir. 1967) (fee union charges for use of hiring hall may reflect only the value of the hiring hall services), *and Morrison-Knudson Co.*, 291 N.L.R.B. 250, 251 (1988). *See ante*, note 10.

due process[93]—here, notice of his delinquency *and a reasonable opportunity to correct it before being delisted and deprived of future job-opportunities*.

Furthermore, the Union's own implementation of its new bylaw demonstrates that a merciless, computerized delisting of individuals thought to be in arrears on payment of dues is *not* necessary for the Union to perform its "representative function". For, under that bylaw, the Union *does* claim personally to notify individuals of their deficiencies and give them an opportunity to take the necessary steps to remain on the shipping list.[94]

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[93] *See Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

[94] The NLRB found, however, that the Union failed to "demonstrate that members and users of its hiring hall services were actually afforded [reasonable] advance notice to correct their delinquencies". 306 N.L.R.B. at 48-49, 44, *in* App. at 33a, 19a-20a.

CONCLUSION

The Court of Appeals' decision effectively overrules Congress by immunizing the "closed shop" in the hiring-hall context, impermissibly narrows the scope of NLRA § 8(b)(1)(A), and creates an unjustifiable dichotomy between the DFR and NLRA § 8(b) unfair labor practices as they apply to hiring halls. For these reasons, this Court should grant Harris' petition and issue a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

4 March 1994

[16 F.3d 1280]
RADIO-ELECTRONICS OFFICERS UNION (RADIO OFFICERS UNION), Petitioner,

v.

The NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 92-1145.

United States Court of Appeals,

District of Columbia Circuit.

Argued Sept. 8, 1993.

Decided March 4, 1994.

* * *

[1281]Before BUCKLEY, GINSBURG, and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

BUCKLEY, Circuit Judge:

The Radio-Electronics Officers Union ("Union") petitions for review of an order of the National Labor Relations Board ("Board") disposing of two cases. In the first of these, the Board found that the Union operated its hiring hall in an arbitrary manner by dropping Michael Harris from its job referral list for failure to pay dues without notifying him in advance of his delinquency. We reverse the Board's decision because we find that the Union delisted Harris pursuant to a neutral, well-known hiring hall rule. In the second case, the Board found that the Union relied on an unlawful ground in refusing to refer Harry Dunleavy for employ-

ment. We conclude that substantial evidence supports the Board's finding.

I. BACKGROUND

A. Factual Background

The Union represents radio officers who work on vessels of the United States merchant fleet. Pursuant to collective bargaining agreements between the Union and various employers, the Union operates a hiring hall that serves as the exclusive source of referrals of radio officers for signatory employers. Union members and non-members may use the hiring hall, which is governed by "National Shipping List Rules" that are incorporated into the collective bargaining agreements. These read, in relevant part, as follows:

> SECTION 1. A member must be in good standing to be placed on the National Shipping List, and must remain so to continue his employment. Non-members must pay the current quarterly service fee to be placed on the National Shipping List and must continue to pay the quarterly service fee during the period of their employment.
> SECTION 2. Registration for placement on the National Shipping List shall be made in writing or in person at any port office....
> SECTION 3. The National Shipping List will be updated monthly on the first business day of each month.

Joint Appendix ("J.A.") at 268-69. Thus the rules require radio officers to apply for inclu-**[1282]**sion on the shipping list. An officer seeking employment must also request placement on the "on-hand" lists that are used to fill job openings on ships sailing from the Atlantic, Pacific, and Gulf coasts. Hiring hall users must be on the shipping list before they may be placed on the on-hand lists.

1. *Harris*

A long-time member of the Union, Michael Harris sometimes used the hiring hall. On March 15, 1988, Harris wrote the Union requesting that it place him on the Atlantic Coast on-hand list, which it did. Harris later failed to pay his quarterly Union dues, which were due April 1. Because of this delinquency, and pursuant to the rules, the Union deleted Harris's name from the shipping list. The Union sent Harris a letter on April 1 notifying him that his name had been stricken for failure to pay dues and adding, "Please remit $75 to be in good standing with [the Union]." *Id.* at 316-17.

During the preceding year, the Union had sent Harris and all other Union members monthly newsletters. The February, April, and December 1987 issues reminded them that under the shipping rules they had to remain in "good standing" with the Union in order to stay on the shipping list. For example, the April 1987 Newsletter contained the following warning:

> NINE MEMBERS WERE DROPPED FROM THE APRIL NATIONAL SHIPPING LIST FOR NON-PAYMENT OF DUES. MEMBERS ARE REQUIRED TO BE IN GOOD STANDING TO GET ON THE LIST. AND THEY ARE REQUIRED TO BE IN GOOD STANDING TO STAY ON THE LIST. THE COMPUTER IS MERCILESS, AND EVEN IF YOU ARE NUMBER 1 WHEN YOU GET BEHIND IN PAYMENT OF DUES, YOU WILL BE DROPPED FROM THE LIST IMMEDIATELY. THE BEST WAY TO AVOID THIS IS TO PAY BY THE YEAR.

Id. at 317.

On June 6, 1988, Harris filed an unfair labor practice charge against the Union, contending that its failure to provide him with notice and an opportunity to cure his payment delinquency before removing him from the shipping list violated section 8(b)(1)(A) and (2) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(1)(A) and (2) (1988).

Subsequently, on November 30, 1988, the Union adopted the following bylaw:

> Dues are required to be received by the Union at least fifteen days prior to the end of each calendar quarter and timely receipt of payment of dues ... shall be required in order to permit registration or continuation of registration on appropriate shipping lists.

J.A. at 320. Under this bylaw, the Union sends a mailing in the 15 days prior to the beginning of each new quarter advising hiring hall users that they are delinquent and that payment is required for continued registration on the shipping list. Harris attacked the new rule in a second unfair labor practice charge filed on December 6, 1988, arguing that it gave insufficient notice.

2. *Dunleavy*

On July 17, 1987, Harry Dunleavy, a Union member, was found guilty on internal Union charges. He was suspended from membership for one year and fined $1,000. Dunleavy never paid the fine. During his suspension, he worked aboard a vessel under contract with the American Radio Association ("ARA"), another radio officers union, from May 23 until October 18, 1988.

In a letter to the Union's hiring hall dated October 25, Dunleavy requested that he be placed on the National Shipping List for November 1988. Dunleavy telephoned the Union's hiring hall on November 4 and was told that although jobs were available, he had not been placed on the November list. The Administrative Law Judge ("ALJ") found that this telephone call had taken place on the same day but before Dunleavy had received an alternative job assignment through the ARA and before the Union had learned of that assignment. Dunleavy accepted the ARA assignment and worked aboard the *OMI Hudson* from November 7 to December 8, 1988.

[1283]In the proceedings before the ALJ, Union President Thomas Harper testified that the November shipping list had not

been prepared until November 7, three days after the Union had learned of the ARA assignment. He further claimed that Dunleavy had not been listed only because he had procured another job on a seagoing vessel, a permissible ground for his exclusion. The ALJ, however, refused to believe Harper, in substantial part because of Harper's references to Dunleavy's ineligibility for a November listing in a letter dated November 3.

That letter was written by Harper in response to Dunleavy's letter requesting the listing. The ALJ determined that Dunleavy could not have received Harper's letter until after he had received the ARA assignment. The letter informed Dunleavy that he was ineligible for the November shipping list and quoted from a memorandum written by the Union's counsel giving two reasons for his ineligibility: (1) Dunleavy had failed to pay the $1,000 fine, and (2) he had violated the shipping rules "taken as a whole" by registering for employment with the ARA during his suspension. J.A. at 306-07. The Union's counsel noted: "In my opinion, any one of these reasons, standing alone, would require [a] finding of ineligibility." *Id.* at 306. In addition to the two reasons offered by the Union's counsel, Harper suggested a third: "[O]ur rules require that all vacation be taken upon the completion of any voyage and your vacation has not been taken." *Id.* at 305.

On November 14, 1988, Dunleavy filed an unfair labor practice charge against the Union, alleging that it had violated the NLRA by refusing to register him because he had failed to pay a fine; in a letter dated December 20, the Union's general counsel apprised the Board of the Union's stance on the Dunleavy case. Unlike Harper, the general counsel rested his conclusion that Dunleavy had been ineligible for the November shipping list almost entirely on Dunleavy's failure to pay the Union fine. Indeed, although he tentatively offered other reasons, he noted: "It should be made clear ... that none of these [additional reasons for ineligibility] are appropriate to consider until Mr. Dunleavy has paid his fine for prior violation of the shipping rules." *Id.* at 310. He also admitted that the Union did not actually know whether Dunleavy had taken the mandatory vacation time, but added: "It is inappropriate ... for the Hiring Hall to examine this question

while it is clear that Mr. Dunleavy is ineligible because he has failed to pay his fine." *Id.*

B. Procedural Background

The ALJ found that the Union's failure to notify Harris of his payment delinquency before removing him from the shipping list violated section 8(b)(1)(A) and (2) of the NLRA. The ALJ's ruling rested largely on his assumption that the collective bargaining agreements governing the Union contained a union security clause. A union security clause, which bars employers from hiring non-union members, imposes a fiduciary duty on the union to give advance notice to its dues-delinquent members and afford them an opportunity to satisfy their dues obligations prior to termination. *See Communications Workers of America, Local 9509 (Pacific Bell)*, 295 N.L.R.B. 196, 200 (1989).

The Board found no evidence of a union security clause but affirmed the ALJ's decision on different grounds. It pointed out that the Union, as the operator of an exclusive hiring hall, owes a duty of fair representation to hall users that requires it to refrain from operating the hall arbitrarily. It also noted that, under Board precedent, any union action that prevents an employee from being hired is presumed to violate the statute. The Board then found that the Union had a duty to notify members of any dues they owed and to give them a reasonable opportunity to remit payment before removing their names from its referral registers, that it had acted arbitrarily and unfairly by removing Harris from the National Shipping List for non-payment of dues by operation of its rule, and that "such general notification of the dues requirement" as that provided by its inclusion in the Union bylaws and occasional mention in monthly newsletters was insufficient. NLRB Decision and Order, 306 N.L.R.B. No. 6, Jan. 21, 1992 ("Board Decision") at 5-6.

[1284]The Board adopted the ALJ's conclusion that the Union's November 30, 1988 bylaw violated the NLRA. *Id.* at 6. The ALJ had found that while fifteen days was a reasonable period to cure a payment delinquency, the Union had failed to show that

each dues-delinquent hiring hall user would actually receive notice fifteen days prior to the start of the quarter.

In the Dunleavy case, the Board adopted the ALJ's finding that in refusing to place Dunleavy on the November 1988 shipping list, the Union had relied solely upon his failure to pay the fine, which was an unlawful ground. Board Decision at 2 n. 2.

II. Discussion

A. The Harris Case

1. *General Principles*

Subsection (b)(2) of section 8 of the NLRA states that

> [i]t shall be an unfair labor practice for a labor organization ... to cause ... an employer to discriminate against an employee in violation of subsection (a)(3).

29 U.S.C. § 158(b)(2). Subsection (a)(3) provides, in pertinent part, that

> [i]t shall be an unfair labor practice for an employer ... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. § 158(a)(3).

The Supreme Court has observed that these subsections "were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954). In *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8 (D.C.Cir.1985), we noted that "[w]hether particular employer conduct caused by the union actually encourages union membership need not be proved by direct evidence" but may be presumed in

certain circumstances. *Id.* at 10. In particular, "conduct [by the union] which causes firing or prevents hiring demonstrates the union's power so dramatically that its illegality is presumed." *Id.* at 11. Thus, with certain exceptions not applicable here, a presumption of illegality arises whenever an employee loses his job or a hiring opportunity as a result of a union's conduct.

To rebut this presumption, the union must show either that its action was taken pursuant to a valid union security clause, or that it "was necessary to the effective performance of its function of representing its constituency." *Id.* (internal quotation marks and citations omitted). Because the Board found that the Union's collective bargaining agreements did not contain any union security clauses, the "necessity" defense is the key to this case.

The most common example of this defense is a union's claim that it acted to enforce a provision of its collective bargaining agreement: The union asserts that a good-faith desire to abide by its contractual duties, rather than an illicit urge to encourage union membership, prompted the action that led to the employee's discharge or loss of a job opportunity. If it can sustain this claim, the union has rebutted the presumption of illegality. *See id.* at 12 (if union could establish that it had acted to protect integrity of collective bargaining agreement, that justification would suffice); *United Bhd. of Painters, Local Union No. 487 (American Coatings, Inc.)*, 226 N.L.R.B. 299, 301 (1976) ("union actions reasonably designed to preserve the integrity of contractually prescribed referral practices, even though those actions bring changes in job status to individual employees, are of a nature meeting the burden of rebuttal.").

The necessity defense, however, is not limited to actions taken pursuant to a collective bargaining agreement. It also embraces those that enforce union administrative rules that are neutral, clearly established, and consistently applied. *See Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C.Cir.1988) (upholding unfair labor practice finding where hiring hall held some registrants to higher-than-usual standards of proof of previous job experience; "a union commits an unfair labor practice if it

admin-[1285]isters the exclusive hall arbitrarily or without reference to objective criteria"); *NLRB v. Ironworkers Local Union No. 505*, 794 F.2d 1474, 1478 (9th Cir.1986) (upholding Board's determination that union acted arbitrarily where it deviated from union's written hiring hall referral rules—rules not specified by the collective bargaining agreement); *Glaziers Local Union 558 v. NLRB*, 787 F.2d 1406, 1414-16 (10th Cir.1986) (union rebutted presumption of illegality where it acted in accordance with long-standing internal referral practice); *International Union of Operating Engineers Local 406 v. NLRB*, 701 F.2d 504, 510 (5th Cir.1983) (union's failure to notify members of change in internal hiring hall policy constituted unfair labor practice); *Teamsters Local No. 519 (Rust Engineering)*, 276 N.L.R.B. 898, 902, 908 (1985) (finding unfair labor practice where union refused to refer members on ground that they failed to comply with orally instituted change to written, internal hiring hall procedures: "any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant ... breaches the duty of fair representation owed to all hiring hall users").

Thus, compliance with established, nondiscriminatory hiring hall procedures is a defense to an unfair labor practice charge. As the Board noted in *Rust Engineering*,

> [i]t is without question that discriminatory referrals from an exclusive hiring hall violates Section 8(b)(2) of the [NLRA]. *A nondiscriminatory exclusive hiring hall arrangement does not violate the Act nor is it unlawful for a union, such as in the instant case, to establish written rules governing the operation of the hiring hall. In fact, it is an encouraged practice to have written rules.*

Id. at 908 (emphasis added) (citation omitted). In sum, in the context of a statute that bars discrimination, the "necessity defense" requires a union to establish that it acted pursuant to a concrete standard—be it a collectively bargained provision, a written union rule, or a long-standing practice—any departure from which could result in a violation of its statutory duties.

2. *Application*

The presumption of illegality undoubtedly applies to the Union's delisting of Michael Harris. By striking his name from the shipping list, the Union deprived him of the chance to secure a job assignment through the hiring hall; and in doing so, it "demonstrate[d] [its] power so dramatically that [the] illegality [of its action] is presumed." *Road Sprinkler Fitters*, 778 F.2d at 11. Because its collective bargaining agreements did not contain a union security clause, the only question before us is whether the Union has rebutted the presumption by establishing a necessity defense. We conclude that it has.

Harris's automatic delisting for failure to pay dues was required by the Union's established hiring hall rules. Although the Board made no formal finding to this effect, it acknowledged that the automatic delisting rule was uniformly applied. The ALJ's opinion notes: "The Union correctly points out that the union in [a case cited by the Board's General Counsel] did not have a uniform and invariable practice of denying referrals for non-payment of dues, whereas [the Union] did.... [T]he Union treated everyone the same with respect to removing them from its National Shipping List for any delinquencies...." J.A. at 319. Similarly, the Board's brief affirmed that "[m]embers who failed to pay their dues by the start of the new quarter were automatically deleted from the job referral lists without advance notice." Brief for Respondent at 3.

Moreover, we believe it reasonable to infer that Harris was aware of this practice. While the shipping rules did not state explicitly that any radio officer who failed to pay his dues or quarterly registration fees on time would be dropped from the list, no one questions (and the monthly newsletters confirmed) that this was the automatic effect of any delinquency. We find it hard to believe that a seasoned mariner who depended on the hiring hall for his livelihood was oblivious of the consequences of failing to pay his dues on time.

The Board nevertheless insists that its precedent required the Union to provide Harris with explicit notice of the conse-[1286]quences of his delinquency together with the opportunity to take corrective action before his name was dropped from the list. The four cases cited by the Board in support of its position, however, all involved collective bargaining agreements containing union security clauses. Under such agreements, an employee must join the union in order to secure a job with a contracting employer; and if the employee should not maintain his membership in good standing, the union has the right to require his discharge. Although permitted by statute, *see* 29 U.S.C. § 158(a)(3), such clauses are strictly regulated because they condition employment on union membership. Thus the Board has held that when enforcing a union security clause, unions must provide advance notice to members before causing an employer to discharge them for failure to pay union dues. *See, e.g., Communications Workers Local 9509 (Pacific Bell)*, 295 N.L.R.B. 196 (1989); *United Bhd. of Carpenters Local 563*, 272 N.L.R.B. 1249 (1984); *Local 1445, United Food and Commercial Workers*, 247 N.L.R.B. 1031 (1980), *enf'd*, 647 F.2d 214 (1st Cir.1981).

Here, however, the Board found no evidence of a union security clause in the Union's collective bargaining agreements, and the Board does not dispute that the Union's hiring hall was open to non-members as well as members. Therefore, the rationale for a stringent notice standard is absent here, and the union security clause cases are inapposite.

Our reasons for finding that the Union's automatic delisting of Harris did not violate the statute apply with equal force to the validity of the November 30, 1988 bylaw.

B. The Dunleavy Case

The Board's finding that the Union excluded Harry Dunleavy from the shipping list solely for an improper reason rests on fact-laden determinations of credibility and motive. We must uphold that finding as long as it is supported by substantial

evidence in the record. *See* 29 U.S.C. § 160(e). We conclude that the Board has met this standard.

The NLRA bars a union from refusing to refer an applicant for employment because of his failure to pay a union- imposed fine. *See, e.g., NLRB v. Leece-Neville Co.*, 330 F.2d 242, 245-46 (6th Cir.1964) (unfair labor practice to cause employer to terminate employee for failure to pay fine). The Union concedes that Dunleavy's failure to pay the fine was one of the reasons motivating its decision not to place him on the November 1988 shipping list. It disputes, however, that this was its *sole* reason and argues that even if Dunleavy had paid the fine, it would have refused to register him for other, legitimate reasons. If the facts supported this argument, the Union would have a good defense under Board precedent. *See Wright Line, A Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), *enf'd on other grounds*, 662 F.2d 899 (1st Cir.1981) (when there is *prima facie* showing that protected conduct was one of several "motivating factors," burden shifts to decisionmaker to demonstrate that it would have taken same action even in absence of protected conduct). But the record contains ample support for the Board's finding that the alternative reasons offered by the Union were pretextual.

Three key pieces of evidence bear on this question. First, there is the November 3, 1988, letter from Harper to Dunleavy reciting the Union counsel's view that Dunleavy was ineligible for registration for either of two reasons: his failure to pay the fine and his acceptance of an assignment from the ARA union during his suspension. In this letter, Harper also noted, as a further reason, that Dunleavy had failed to take vacation time as required by the shipping rules.

The second piece of evidence is the December 20, 1988, letter from the Union's general counsel to the Board, which painted a different picture of the Union's motives. This letter was devoted almost entirely to an argument that Dunleavy's failure to pay the Union fine rendered him ineligible for referral. At the end of the letter, the general counsel suggested there might be other reasons for Dunleavy's ineligibility. He raised the issue of Dunleavy's

mandatory vacation time but noted that "the Hiring Hall is unaware of whether Mr. Dunleavy has taken **[1287]**[it]." J.A. at 310. He also raised Dunleavy's acceptance of the ARA assignment. The general counsel stated, however, that neither "of these [additional grounds] are appropriate to consider until Mr. Dunleavy has paid his fine for prior violation of the shipping rules." *Id.* The ALJ concluded that the general counsel's statements about vacation time and Dunleavy's acceptance of the ARA assignment were pretextual. Moreover, he found that the general counsel's admission that the Union did not know whether Dunleavy had taken his mandatory vacation undercut Harper's letter of November 3, which chastised Dunleavy for flouting the vacation rule. The ALJ's reliance on the general counsel's letter rather than Harper's for evidence of the Union's motives was reasonable.

Finally, there is Harper's testimony that the Union did not reach its final decision to exclude Dunleavy from the list until after it had learned of his ARA assignment on November 4. The ALJ, however, refused to believe Harper and thus rejected the Union's argument that it excluded Dunleavy from the November list only because he had accepted another job. We must uphold the ALJ's credibility determination unless it is "hopelessly incredible" or "self-contradictory." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1368 (D.C.Cir.1983). It is neither. The ALJ rejected Harper's testimony for three reasons. First, the shipping rules state that "[t]he National Shipping List will be updated monthly on the first business day of each month." J.A. at 326-27. The first business day fell on November 1. Thus, the decision to exclude Dunleavy was probably made by November 1. Second, Harper's letter informing Dunleavy that he was ineligible was dated November 3, the day before the Union learned of Dunleavy's ARA assignment. Third, when Dunleavy telephoned the hiring hall on November 4 prior to receiving his ARA assignment, he was told he was not on the list.

In sum, we find that the record provides sufficient support for the Board's conclusion that the Union refused to refer Dunleavy solely because of his failure to pay the union fine.

III. CONCLUSION

In the case of Harris, we reverse the Board's finding that the Union violated the NLRA, and deny the Board's cross-application for enforcement; in the case of Dunleavy, we grant the Board's cross-application for enforcement.

So ordered.

APPENDIX B

DECISION AND ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

21 January 1992

and

DECISION OF THE

ADMINISTRATIVE LAW JUDGE

25 April 1990

[306 N.L.R.B. 43]
Radio-Electronics Officers Union *and*
Michael F. Harris *and* Harry Dunleavy *and*
Sea Land Service, Inc., Party in Interest.
Cases 15-CB-3458, 15-CB-3469-3, and
15-CB-3488-2

January 21, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On April 25, 1990, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's

rulings, findings,[1] and conclusions[2] as modified below and to adopt the recommended Order as modified.[3]

The judge found, inter alia, that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act in the operation of its exclusive hiring hall by removing Michael F. Harris from its referral registers for nonpayment of dues and by the operation of its rule requiring the timely payment of dues for continued registration on its referral lists. For the reasons that follow, we agree with the judge that the Respondent violated Section 8(b)(1)(A) by operating its hiring hall in this manner.

The Respondent is a national labor organization representing members and others employed as radio officers, radio electronics officers, and master radio electronics officers on vessels of the United States Merchant Marine Fleet, as well as other oceangoing

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We affirm the judge's finding that the Respondent unlawfully refused to allow Harry Dunleavy to register for referral because he had not paid a fine for violation of hiring hall rules. We agree with the judge, for the reasons stated in his decision, that the Respondent failed to show that it would have refused to allow Dunleavy to register even if he had paid the fine. In this regard, we note that, contrary to the Respondent's contention that Dunleavy was not eligible for referral because he had not taken mandatory vacation time, the Respondent's attorney, in a letter to the Board's Regional Director's office, admitted that "the Hiring Hall is unaware [illegible] whether Mr. Dunleavy has taken the mandatory vacation time."

[3] The General Counsel has excepted to the judge's failure to require, in addition to the usual notice posting, that the Respondent mail copies of the notice to all members and users of its hiring hall in order to apprise them of their rights under the Act. Because the evidence shows that the Respondent's hiring hall refers applicants for employment on a nationwide basis, we agree with the General Counsel that the imposition of a mailing requirement is appropriate here. We shall modify the judge's recommended Order accordingly.

freight transportation vessels. Pursuant to its collective-bargaining agreements with various employers and employer associations, the Respondent operates a hiring hall that serves as the exclusive source of referrals of radio officers to the various employers. The Respondent prepares both a national shipping list and the on-hand list under its shipping rules for job registrants. The national shipping list, which the Respondent normally prepares on or about the first of each month, establishes a ranking of eligible users of the hiring hall for referrals. An applicant for employment must register on the national shipping list in order to be eligible for referral. The applicant then makes a separate written request for placement on any of the Respondent's three different on-hands lists, which are prepared weekly and which establish the order of referral for jobs on vessels based in the Atlantic, Gulf, and Pacific waters.

Harris was a long-time union member who from time to time had utilized the Respondent's hiring hall. By letter dated March 15, 1988,[4] Harris requested that the Respondent place him on the Atlantic coast on-hand list and the Respondent did so. It is undisputed that Harris did not pay his second quarter dues, which were payable on or before April 1. By computer-generated action on April 1, the Respondent then automatically removed Harris from its national shipping list and sent Harris a form letter notifying him of this action. Thus, Harris no longer was eligible for referral from the Respondent's hiring hall.

Thereafter, on August 11, the Respondent's membership through a referendum conducted by the American Arbitration Association voted to raise the quarterly dues from $75 to $100 and to amend the bylaws as set forth below. Based on this vote, the Respondent has maintained in effect and enforced the following bylaws since at least November 1:

> Dues are required to be received by the Union at least fifteen days prior to the end of each calendar quarter and timely

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[4] All dates are in 1988 unless otherwise noted.

receipt of payment of dues (or fees as the case may be shall be required in order to permit registration or continuation of registration on appropriate shipping lists.

The Respondent's president, Thomas Harper, testified that under the new amendments the Respondent sends a mailing between 15 days before the beginning of each new calendar quarter and the actual start of the quarter informing applicants who are delinquent in **[44]**their dues or fees that the Respondent will delete their names from its referral lists unless they pay the amounts owed.

The judge found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by removing Harris from the national shipping list for nonpayment of dues without first providing him with notice of his delinquency and affording him a reasonable opportunity thereafter to meet his obligation prior to being dropped from the shipping list. In reaching this conclusion, the judge stressed that before removing a dues-delinquent applicant from its referral register, a union has a fiduciary duty arising from its union-security clause to notify the individual of his delinquency and give him a reasonable opportunity to satisfy his dues obligations. The judge found that the Respondent failed to afford Harris these procedural protections and that, therefore, Harris' removal from its out-of-work list violated the Act.

The Respondent points out in its exceptions that the record is devoid of evidence that any collective-bargaining agreement to which it is a party has a union-security clause. In these circumstances, the Respondent argues that its legitimate requirement that all registrants pay a uniform quarterly fee in advance was nondiscriminatory and did not coerce employees in the exercise of their Section 7 rights. The Respondent therefore urges the Board to find that its hiring hall operations did not violate the Act.

In considering this issue, we initially note that, as the Respondent has asserted, the General Counsel has failed to present evidence that any collective-bargaining agreement providing for the operation of the Respondent's hiring hall contains a union-security clause. Nevertheless, we emphasize that the Respondent has not

contested the judge's finding that its hiring hall is the exclusive source of referrals for the employers and employer associations who are signatory to the applicable collective-bargaining agreements. It is well established that, as the operator of an exclusive hiring hall, the Respondent owes a duty of fair representation to applicants using that hall.[5] As part of its duty of fair representation, the Respondent has an obligation to operate the exclusive hiring hall in a manner that is not "arbitrary or unfair."[6] The Board has reasoned that whenever a union prevents an employee from being hired, it demonstrates its power and influence over his livelihood so dramatically as to compel an inference that the effect of the union's action is to encourage union membership on the part of all employees who have perceived the display of power. A union may overcome that inference, however, either by acting pursuant to a valid union-security clause or by showing that its action was necessary to the performance of its representative function.[7] The Respondent has failed to overcome that inference. There is no evidence of a union-security clause here, and the Respondent has not shown that removing Harris from the national shipping list in the manner it did was necessary to the effective performance of its representative function.

Thus, we find that the Respondent had a duty to notify members and other applicants for employment of any dues or fees they owe and to give them a reasonable opportunity to remit payment before removing their names from its referral registers. We further conclude that in this case the Respondent acted arbitrarily and unfairly by removing Harris from the national shipping list for nonpayment of dues and by the operation of its rule described above requiring the timely payment of dues for continued registration on the various shipping lists the Respondent maintains. Although the Respondent argues that it gave Harris notice of his dues obligation by setting forth the requirement in its

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[5] See *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989).

[6] See *Miranda Fuel Co.*, 140 N.L.R.B. 181, 184 (1962).

[7] *Operating Engineers Local 18*, 204 N.L.R.B. 681 (1973).

bylaws and by occasionally mentioning it in monthly newsletters distributed to the membership, such general notification of the dues requirement is insufficient, in our view, to justify the Respondent's removal of Harris' name from the referral list. We find, rather, that in light of its obligation to operate the hiring hall fairly and impartially the Respondent was obligated to give Harris specific notice of his particular financial deficiency before taking action that would be detrimental to Harris' employment opportunities. Further, regarding the application of the Respondent's November 1988 rules revision, we stress that the Respondent's own witness, President Harper, testified that under the new amendments the Respondent sends a mailing at some point between 15 days before the beginning of each new calendar quarter and the actual start of the quarter informing applicants of any dues or fees delinquency. Based on Harper's testimony, we agree with the judge that the Respondent has not afforded applicants who are in arrears on dues or fees a reasonable time to make these payments.

Thus, for these reasons, we adopt the judge's findings that the Respondent violated Section 8(b)(1)(A) of the Act by removing Harris from its referral registers and by the operation of the November 1988 rule requiring the timely payment of dues for continued registration.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Radio-Electronics Officers Union (Radio Officers Union), Panama City, Florida, its officers, agents, and rep-**[45]**resentatives, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(d) and reletter the subsequent paragraph accordingly.

"(d) Mail a copy of the notice to all members and users of the Respondent's hiring hall. The Respondent shall mail the

notices to the last known address of each member and applicant for employment at its hiring hall."

Joseph B. Morton, III, Esq., for the General Counsel.
Ernest Allen Cohen, Esq. (Marchi, Jaffe, Steinberg, Crystal, Katz & Burke), of Tucson, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. These cases were tried before me in Panama City, Florida, on November 8 and 9, 1989, based upon various unfair labor practice charges filed by Michael F. Harris (Harris) and Harry Dunleavy (Dunleavy) against the Radio Officers Union, Radio Electronics-Officers Union (the Union). An order consolidating cases, consolidated complaint and notice of hearing (complaint) was issued by the Regional Director for Region 15 of the National Labor Relations Board (Board) on January 31, 1989. The charge in Case 15-CB-3487 (formerly Case 22-CB-5892-5) filed by Harris on June 8, 1988, related in general terms to a hiring hall classification grandfathering provision. That charge was settled by agreement of the parties at the conclusion of the hearing on November 9, 1989. That case was severed from the remaining cases and remanded to the Regional Director for Region 15 of the Board for compliance. The charge in Case 15-CB-3488-1 (formerly Case 22-CB-5895-1) filed by Harris on June 6, 1988, involved allegations that 35 unidentified individuals were dropped from the Union's shipping lists without adequate notice of dues delinquencies. That charge was withdrawn by counsel for the General Counsel in his posttrial brief. Accordingly, no consideration will be given to the allegations of that case. The charge in Case 15-CB-3488-2 (formerly Case 22-CB-5895-2) filed by Harris on June 6, 1988, alleges the Union violated Section 8(b)(1)(A) and (2) of the Act, by removing Harris from its national shipping list for nonpayment of dues without first providing him with notice of his delinquency and without affording him a reasonable opportunity to meet his obligations in that respect. The charge in Case 15-CB-3469-3 filed by Harris on December 6,

1988, alleges that the Union by maintaining bylaws which require the timely receipt of dues payments in order for radio officers to register or to continue registration on its shipping lists without advance notice to delinquent members that they are in fact delinquent violates Section 8(b)(1)(A) and (2) of the Act. The charge in Case 15-CB-3458 (formerly Case 22-CB-6000) filed by Dunleavy on November 14, 1988, alleges the Union violated Section 8(b)(1)(A) and (2) of the Act by refusing to register Dunleavy for referral from its exclusive hiring hall because he failed to pay a fine and/or for reasons other than his failure to tender periodic dues and initial fees uniformly required as a condition of acquiring or retaining membership in the Union.

The parties were afforded full opportunity to examine and cross-examine witnesses, to argue orally, and to submit briefs. Briefs which have been carefully considered were submitted by counsel for the General Counsel and counsel for the Union.

Upon the entire record,[1] including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE COMPANY'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS

At all times material Sea Land Service, Inc., a corporation with and an office and place of business in Edison, New Jersey, has been engaged in the interstate and international transportation of freight. During the 12 months preceding the issuance of complaint, Sea Land Service, Inc. derived gross revenues in excess of $50,000 for the transportation of freight between the States of the United States and between the United States and foreign countries. The complaint alleges, the Union admits, and I find Sea

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[1] I have considered all record evidence and positions taken by the parties in argument at trial or in their posttrial briefs whether alluded to in this decision or not.

Land Service, Inc. is, and at all times material has been, an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, it is admitted, and I find the Union is, and all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union is a national labor organization representing members and others employed as radio officers, radio electronics officers, and master radio electronics officers on vessels of the United States Merchant Marine Fleet as well as other oceangoing freight transporting vessels. The Union and various employer-associations and employers, including Sea Land Service, Inc., are parties to collective-bargaining agreements requiring that the Union be the sole and exclusive source of referrals of radio officers to employment with the various employers. The Union operates its hiring hall under both general and national shipping rules, which rules are made part of the collective-bargaining agreements between the Union and various employer-associations as well as other employers. Additionally, such shipping rules are incorporated into the bylaws of the Union. The shipping rules utilized by the Union establishes, among other things, a system for the distribution of job assignments to users of its hiring hall. The Union's shipping rules provide for two shipping lists. The two lists are the national shipping list and the on-hand list. The national shipping list establishes a ranking of eligible users of the hiring hall for referrals. Anyone wishing to use the hiring hall must submit a written request to be placed on the national shipping list. The national shipping list is normally prepared on or about the first of each month and the listings are based on information received in the form of written requests that are received prior to close of business on the first day of each month. After requesting to be placed **[46]**on the national shipping list a user of the hiring hall must submit a separate written request for placement on the

Union's Atlantic, Gulf, or Pacific on-hand lists. The on-hand lists are prepared on the first day of each week and the listings are based on the rankings set forth in the most recent national shipping list. The on-hand lists for the specific areas are the lists that are actually used to dispatch users of the hiring hall to available assignments. Simply stated a user of the hiring hall must be on the national shipping list in order to thereafter be listed on the weekly on-hand lists from which all referrals are made.[2]

In order to better under stand the facts set forth and to understand the legal conclusions drawn therefrom it is helpful to note the following portions of the Union's shipping rules:

ARTICLE NINETEEN—NATIONAL SHIPPING LIST RULES

SECTION 1. A member must be in good standing to be placed on the National Shipping List, and must remain so to continue his employment. Non-members must pay the current quarterly service fee to be placed on the National Shipping List and must continue to pay the quarterly service fee during the period of their employment.

SECTION 2. Registration for placement on the National Shipping List shall be made in writing or in person at any port office. Numbers in the appropriate group for which a Radio Officer is eligible shall be assigned as of the date such registration is received.

SECTION 3. The National Shipping List will be updated monthly on the first business day of each month.

SECTION 4. Radio Officers may request placement on the National Shipping List in writing when off a vessel for vacation or any other reason. Upon assignment for more than fourteen (14) days the Radio Officer's name shall be removed from the list.

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[2] Prior to August 1988 the on-hand lists were prepared on a bi-monthly basis.

SECTION 5. Should an error occur on the National Shipping List, the error will be corrected immediately when discovered.

ARTICLE TWENTY—SHIPPING RULES

SECTION 1. In order to provide the maximum amount of work for the largest number of Radio Officers and to equalize employment opportunities:

a. Each Radio Officer shall take all vacation accrued when requesting a relief, or when leaving a temporary assignment.

b. A Radio Officer is required to take a mandatory vacation upon accrual of ninety (90) days vacation benefits, except as set forth in paragraph (d) of this Section. This rule will apply at the end of the voyage and/or port period.

c. Upon recommendation of the District Administrative Council and with the approval of the District Executive Council, the ninety (90) days rule may be modified to meet existing circumstances.

d. A Radio Officer attached to a vessel on extended voyages which may exceed six (6) months or attached to a vessel on an overseas shuttle route may remain employed on the vessel for six (6) months before requesting a vacation in accordance with Section 1.a. above.

B. *Removal of Harris from the National Shipping List for Nonpayment of Dues*

As noted earlier it is alleged in Case 15-CB-3488-2 that the Union violated Section 8(b)(1)(A) and (2) of the Act, when on April 1, 1988, it dropped Harris from its national shipping list for nonpayment of dues without adequate notice of his dues delinquency. The operative facts, some of which are set forth earlier in this decision, related to Harris are not in dispute.[3] As of April 1, 1988, Harris had been a long-time member of the Union and had from time to time utilized the Union's hiring hall. In a letter

[3] Harris was not present at any time during the hearing.

dated March 15, 1988, and received by the Union on March 19, 1988, Harris requested that he be placed on the Atlantic Coast on-hand list.[4] Harris was placed on the next Atlantic Coast on-hand list, however, he did not thereafter request to be on any future on-hand lists.[5] Harris did not pay his second quarter dues which were payable on or before April 1, 1988. On April 1, Harris was, by computer generated action, automatically removed from the Union's national shipping list. A form letter was sent to Harris on April 1 that informed him:

> Date [April 1, 1988]
>
> Dear Brother: [Harris]
>
> You are being dropped from the National Shipping List because you are in arrears in dues for the following quarter/quarters: [Second Quarter 1988]
>
> Please remit [$75] to be in good standing with the Radio-Electronics Officers Union.
>
> Please reregister after dues are paid.

Union President Thomas C. Harper (Harper) testified Harris was not given any individualized advance notice prior to his being dropped from the national shipping list on April 1, 1988, for nonpayment of dues. Harris, as well as all union members, were mailed union newsletters generally on a monthly basis. In its February, April, and December 1987 Newsletters, the Union advised its members they had to be in good standing with the Union to be on its national shipping list as well as any on-hand

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[4] Harris' written request reads as follows: "Available on-hand Atlantic permanent assignment Sea Land Econo Ship, 22 March 88—4 April 88. No collect calls accepted."

[5] As is noted elsewhere in this decision no user of the hiring hall can be placed on an on-hand list for any location without first being on the Union's national shipping list.

lists. For example, the April 1987 Newsletter contained a portion captioned "Dues Problems" which read as follows:

> NINE MEMBERS WERE DROPPED FROM THE APRIL NATIONAL SHIPPING LIST FOR NON-PAYMENT OF DUES. MEMBERS ARE REQUIRED TO BE IN GOOD STANDING TO GET ON THE LIST. AND THEY ARE REQUIRED TO BE IN GOOD STANDING TO STAY ON THE LIST. THE COMPUTER IS MERCILESS, AND EVEN IF YOU ARE NUMBER 1 WHEN YOU GET BEHIND IN PAYMENT OF DUES, YOU WILL BE DROPPED FROM [47]THE LIST IMMEDIATELY. THE BEST WAY TO AVOID THIS IS TO PAY BY THE YEAR. 4/4/87

President Harper testified he was not aware of any notice of any kind being sent to Harris between December 1987 and April 1, 1988, regarding delinquent dues.

It is undisputed that Harris did not pay his union membership dues for the second quarter of 1988. Nor is it disputed that he was automatically removed from the Union's national shipping list on April 1, 1988, because he had not timely paid his dues. Against that backdrop counsel for the General Counsel urges that a union has a duty to deal fairly with its members before it enforces the terms of any union-security provisions[6] against them. The Union does not take issue with the above stated principle but simply urges it dealt fairly with Harris and other like situated users of its hiring hall. Counsel for the General Counsel asserts the Union failed to meet its minimum fair duty obligation of (1) notifying Harris of his dues delinquency, (2) advising him of the amount owed and the method and manner that amount was arrived at, and (3) providing him a reasonable opportunity to comply with the obligations imposed by the union-security clause before dropping him from its national shipping list. The Union urges it gave Harris and others

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[6] Counsel for the General Counsel does not challenge the union-security or the hiring hall provisions in the instant case.

adequate advance notice (1) by its published shipping rules and bylaws namely article XIX, section 1, that reads in pertinent part "A member must be in good standing to be placed on the National Shipping List, and must remain so to continue his employment," (2) by its monthly newsletters that contained portions of its shipping rules and indicated such would be strictly enforced, (3) by its strict computerized enforcement of its shipping rules which strict enforcement had been made known to its membership, and (4) by informing those dropped by specialized letter that they had been in fact dropped from its national shipping list.

It is helpful to note certain principles the Board and courts have established with respect to issues similar to the ones under consideration. It is well settled that a union may lawfully seek the discharge of an employee where dues are in arrears if it has a valid union-security clause in its collective-bargain agreement with the employer. *Iron Workers Local 118*, 257 NLRB 564, 566 (1981) enfd. 720 F.2d 1031 (9th Cir. 1983). *Mayfair Coat & Suit Co.*, 140 NLRB 1333 (1963). The Board noted that "a valid union-security clause can be enforced at the hiring hall level by refusal to refer an employee whose dues are in arrears." *Id.* at 566. The court in *NLRB v. Hotel Employees Local 568*, 320 F.2d 254 (3d Cir. 1963) noted the existence of a contractual union-security clause inevitable leads to employee dependence on a labor organization. The court further noted:

> There necessarily arises out of this dependence a fiduciary duty that the union deal fairly with employees. See *N.L.R.B. v. International Woodworkers of America*, 264 F.2d 649 (9th Cir. 1959), cert. den. 361 U.S. 816, 80 S.Ct. 56, 4 L.Ed.2d 63 (1959); *International Union of Electrical, Radio & Machine Wkrs. v. N.L.R.B.*, 113 U.S. App. D.C. 342, 307 F.2d 679 (1962) cert. den. 371 U.S. 936, 83 S.Ct. 307, 9 L.Ed.2d 270 (1962). At the minimum, this duty requires that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure.

The Board in *Carpenters Local 563*, 272 NLRB 1249 fn. 1 (1984), held that by failing to allow two individuals a reasonable opportunity to satisfy their delinquent dues obligations before denying them referrals the union violated Section 8(b)(1)(A) and (2) of the Act. With respect to the *Carpenters* case, counsel for the General Counsel contends that before the Union here could have escaped violating the Act it would have had to have given Harris individualized notice of his dues delinquency, advised him of the amount owed, informed him of the method used in computing the amount, and have given him a reasonable opportunity to comply therewith before removing him from its national shipping list and its on-hand lists. Counsel for the Union urges the *Carpenters* case does not establish a per se rule that a union must always give delinquent members an opportunity to pay back dues before they can lawfully be removed from hiring hall lists. In any event, the Union urges the instant case is factually distinguishable from the *Carpenters* case and notes that case was limited to its particular circumstances.

Applying the above principles, I am persuaded a union may not lawfully remove users of its hiring hall from its exclusive referral lists without first (1) advising the users they are in arrears on their dues, (2) advising the users of the amounts owed and how the amounts were arrived at, and (3) give the users a reasonable time to take corrective actions to remain on the exclusive referral lists. Anything less than the above will not relieve a union of its fiduciary obligations. See, e.g., *Communications Workers Local 9509 (Pacific Bell)*, 295 NLRB 196 (1989). In the instant case the Union clearly failed to demonstrate it afforded Harris the benefit of the above outlined minimum standards. I reject the Union's contention that the generalized notice it provided in its monthly newsletters taken in conjunction with its assertion its shipping rules were well known was sufficient to satisfy it fiduciary duty to members and others utilizing its hiring hall. The Union's contention that the *Carpenters* case is factually distinguishable from the instant one misses the point on the general principle established by that case. The Union correctly points out that the union in the *Carpenters* case did not have a uniform and invariable practice of denying referrals for nonpayment of dues, whereas it did. However, the fact the Union in the instant case, through its computer-

ized action, has been "merciless" in removing anyone from its national shipping list that was in arrears on dues does not meet the issue of affording the users of its hiring hall services an opportunity to clear up any delinquencies before being removed from its lists. The simple fact the Union treated everyone the same with respect to removing them from its national shipping list for any delinquencies does not insulate it from the fiduciary duty it owes the users of its exclusive hiring hall services. I likewise reject the Union's other "distinguishing element" in that it contends its role as a maritime union makes it "unique" and as such it would be "unworkable and inequitable" to apply the *Carpenters* standard to the maritime industry. The Union argues that in the construction industry, which was involved in the *Carpenters* case, it was and is easy to have a delinquent member removed from a nearby job after being referred and then **[48]**being apprised of dues arrearages whereas it would not be so simple where the delinquent dues member is on the high seas. The Union asserts that the problems it, as well as the employer's, would face in removing delinquent members from jobs at sea, are almost insurmountable in that all seagoing vessels must have a licensed radio officer on board. The Union argues that if a radio operator is removed at sea the vessel may not continue to operate legally until a replacement is found and such could result in severe hardships such as cargo spoilage or late delivery penalties for the shipper. The fact a maritime union may have a difficult time policing dues payments or that employers involved therewith may potentially incur increased monetary risks does not relieve a union of the fiduciary duty it owes to those utilizing its exclusive hiring hall arrangements.

In summary, I find as alleged in the complaint that the Union violated Section 8(b)(1)(A) and (2) of the Act, when on April 1, 1988, it removed Harris' name from its national shipping list because he failed to remain current in his dues without first

informing him of such failure and without affording him a reasonable opportunity thereafter to meet his dues obligations.[7]

C. *The Rule Requiring the Timely Payment of Dues to be or Continue Registration on Shipping Lists*

As earlier noted it is alleged in Case 15-CB-3469-3 that the Union violated Section 8(b)(1)(A) and (2) of the Act by, since on or about November 30, 1988, maintaining in effect and enforcing the following bylaws:

> Dues are required to be received by the Union at least fifteen days prior to the end of the each calendar quarter and timely receipt of payment of dues (or fees as the case may be) shall be required in order to permit registration or continuation of registration on appropriate shipping lists.

It is undisputed that the Union changed its bylaws with respect to the payment of and amount of dues by a referendum of its membership conducted by the American Arbitration Association (AAA), the results of which were certified by the AAA on August 11, 1988. The union membership not only adopted the above set forth amendment to its bylaws but in addition raised its quarterly dues from $75 to $100. Thereafter, employers that were parties to collective-bargaining agreements with the Union consented to the above-amendment changes which changes were incorporated into the applicable collective-bargaining agreements. The exact effective date for the amendments is not clear; however, it appears the amendments were effective by at least November 1, 1988.

Union President Harper testified that under the new amendments a mailing is sent between 15 days prior to the beginning of each new quarter and the actual start of the new quarter that advises those using the hiring hall that they are delinquent in their

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[7] It is inconsequential at this stage of the proceeding that Harris may well have rejected various job offers from the Union or that he had indicated he would not accept collect telephone calls from the Union related to any matters including job referrals. Such may become pertinent at the compliance stage of this matter.

dues and further advises that the dues are required in order to permit or continue registration on its shipping lists. President Harper testified he "believed" the same form type letter previously utilized before the new amendment is still utilized to inform members of their delinquencies. The language of the prior letter is set forth elsewhere in this decision and will not be repeated here.

Counsel for the General Counsel urges that although the Union may lawfully remove members and others from its shipping lists for being delinquent in dues or fees payments it must not breach its fiduciary duty to those being removed from or denied registration on its shipping lists. Counsel for the General Counsel also urges that to meet its duty to deal fairly with users of its hiring hall services the Union must at a minimum provide users with notification of (1) the precise amount owed in dues or fees, (2) the method utilized in arriving at the amounts owed, and (3) provide users a reasonable opportunity to make such payments. Counsel for the General Counsel urges that under the new amendment the Union demands timely payment of dues or fees and removes individuals from its lists at the same time it notifies them they are delinquent in their dues or fees payments. Counsel for the General Counsel urges that in so doing the Union violates the fiduciary duty it owes its members and users and as such violates the Act.

Counsel for the Union argues that its newly amended dues and fees procedures meets all fiduciary obligations it owes its members and users of its services and further urges that counsel for the General Counsel has failed to present any evidence to show its present system is anything but fair and reasonable. The Union asserts it provides 15 days' advance notice before it actually removes anyone from its shipping lists for dues arrearages, thus it argues those impacted have a reasonable opportunity to establish or reestablish good standing with the Union and to be restored to its shipping lists.

Under its newly amended dues and fees requirements and notification procedures the Union meets for the greater part at least two of the three requirements it must in order to fulfill its fiduciary

obligations owed to the users of its exclusive referral system. First members are advised they are in arrears on dues and the amount owed ($100) was arrived at by referendum of the union membership. Hence, notification is given and the method of arriving at the amount owed has been established. However, I find the Union has failed, in the scant record evidence on this point, to demonstrate that those in arrears on dues or fees were actually afforded a reasonable time to take the necessary steps to remain on the shipping lists. The Union argues letters of notification have been and are sent to those in arrearage on dues or fees beginning 15 days before each new quarter starts. However, the record does not conclusively support that argument. Union President Harper testified notices went out 15 days prior to each quarter break as called for in the newly amended bylaws. However, a reading of the changed bylaws only reflects dues or fees are to be received 15 days prior to the end of each calendar quarter not that notification will automatically be sent to those delinquent in dues or fees payments on that precise date. When questioned further on this matter, President Harper testified in reference to a specific example that mailings were made between 15 days before the end of a quarter and the actual beginning of a new quarter. I am persuaded that 15 days' advance notice is reasonable. See, e.g., *United Metaltronics Local 955*, 254 NLRB 601 (1981). However, **[49]**the Union failed to conclusively demonstrate that members and users of its hiring hall services were actually afforded 15 days' advance notice to correct their delinquencies. Accordingly, and in light of the above, I find the Union violated Section 8(b)(1)(A) and (2) of the Act as alleged in the complaint by failing to demonstrate it allowed delinquent dues payers or users of its hiring hall services a reasonable time to correct dues or fees deficiencies before removing such users from its shipping lists.

D. *The Alleged Failure to Allow Dunleavy to Register for Referral*

As noted earlier it is alleged in Case 15-CB-3458 that the Union on or about October 1, 1988, refused in violation of Section 8(b)(1)(A) and (2) of the Act to allow employee Dunleavy to register for referral from its exclusive hiring hall because he failed

to pay a fine and for reasons other than his failure to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the Union.

Dunleavy has worked as a radio officer engaged in ship-to-shore communications since at least 1977. Dunleavy has been a longtime member of the Union. Internal union charges were lodged against Dunleavy on or about July 15, 1987, as a result of his having accepted a temporary job assignment without clearance from the Union on a seagoing vessel not covered by a collective-bargaining agreement with the Union. On or about July 17, 1987, the Union found Dunleavy guilty of the internal union charges lodged against him and as a result thereof he was fined $1000, suspended from membership in the Union for 1 year, and suspended from using the hiring hall for 1 year.[8] In July 1988, Dunleavy completed serving his suspension from membership in the Union and from use of the hiring hall but he has never at any time paid the $1000 fine levied against him. It is undisputed that Dunleavy did not attempt to utilize the hiring hall during the year of his suspension; however, he did attempt in January 1988 to pay quarterly union dues which were rejected by the Union and returned to Dunleavy. During his suspension from membership in the Union, Dunleavy accepted a seagoing assignment through the American Radio Association (ARA)[9] aboard the merchant vessel *Margaret Lykes* which assignment lasted for approximately May 23 until October 18, 1988.

In a letter dated October 25, 1988, Dunleavy advised the Union of the employment dates he had been assigned aboard the *Margaret Lykes* and requested that he be placed "on the November, 1988 National Shipping List." Thereafter, on October 29, 1988, Dunleavy sent a mailgram to the Union in which he requested placement on the Atlantic on-hand list. Dunleavy

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[8] The propriety of the internal union charges that resulted in the discipline noted are not before me.

[9] Although the evidence is not conclusive nor is it essential to decide the issue, it appears the ARA is a rival of the Union.

testified without contradiction he telephoned the union hall on November 2, 1988, and spoke with a secretary (Sheryl Bell) about his placement on the national shipping list. Dunleavy testified the secretary refused to give him any information about the list and in fact hung up the telephone on him. Dunleavy testified that after a few minutes he again on November 2, 1988, called the union hall and spoke with the same secretary who again refused to provide him any information on the national shipping list, but did state a union official would call him back.[10] Dunleavy testified no one called him back, so on November 3, 1988, he called the union hall again. Dunleavy again asked if he was on the national shipping list and what his position on that list was. Dunleavy testified without contradiction he was told he was not on the national shipping list and that he would be given the reasons why.[11] Dunleavy was not allowed to speak with any union official; however, on that date (November 3, 1988) Union President Harper wrote Dunleavy a three-page letter in which he acknowledged Dunleavy's written communications with the Union on October 25 and 29, 1988, and his two telephone calls to the union hall on November 2, 1988. In his letter, Harper informed Dunleavy he had sought legal advice on Dunleavy's registration request.[12] Harper set forth portions of his attorney's letter of advice in his letter to Dunleavy and informed Dunleavy he was ineligible to be placed on the national shipping list for three reasons. The three reasons set forth in Harper's letter were (1) Dunleavy had not paid the $1000 fine imposed on him by the Union, (2) Dunleavy appeared to be in violation of the "shipping rules taken as a whole" related to dual registration by

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[10] The Union's telephone logs reflect Dunleavy called the union hall at 10:30 and 10:45 a.m., and that he spoke on both occasions with Sheryl Bell. Bell noted on the logs that Dunleavy was "very demanding" in seeking information.

[11] The Union's telephone logs reflect Sheryl Bell spoke with Dunleavy at 10:50 a.m. on November 3, 1988, and that the subject matter of their conversation was the "shipping list."

[12] In the attorney's letter to Harper, the attorney outlined the question Harper had sought advice on as follows: "You have asked for my opinion with regard to whether or not Mr. Dunleavy should be placed upon the National Shipping List for November 1988."

being on a shipping list outside the Union without permission, and (3) Dunleavy had not completed taking some outstanding accrued mandatory vacation time.[13] On November 4, 1988, Dunleavy again telephoned the union hall and on this occasion spoke with Danielle Holleyfield.[14] According to Dunleavy's credited testimony Holleyfield, told him "there were jobs available" and only "about 10 people" on the national shipping list. Dunleavy asked if he was on the national shipping list[15] and Holleyfield told him he was not. Dunleavy testified Holleyfield did not give him any reason for his not being included on the Union's November national shipping list.[16]

Dunleavy testified he felt any further attempts to be referred for work assignments through the Union's hiring hall **[50]**would be futile. Dunleavy testified: "After I perused Mr. Harper's letter of November 3, [1988] then I attempted to get work through the American Radio Association." Dunleavy testified he was notified by the ARA on either November 5 or 6, 1988, that he was being given an assignment on the merchant vessel *OMI Hudson*. Dunleavy said that he was "sure" he was not notified of the assignment on November 4, 1988. Dunleavy testified he flew to

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[13] Harper explained in his letter why Dunleavy had not been placed on the October national shipping list. However, it is unnecessary to consider that portion of his letter in that Dunleavy specifically requested that he be placed on the November list. It appears Harper understood that to be the case in that he sought legal advice only with respect to Dunleavy's placement on the Union's November national shipping list.

[14] The Union's telephone logs reflect Dunleavy called the union hall at 9 a.m. Holleyfield reflected on the log that Dunleavy "wanted to know why TCH [Harper] has not called back."

[15] On cross-examination by the Union's attorney, Dunleavy testified Holleyfield told him the November list had already been prepared as of the time they spoke and he was not included on it.

[16] Holleyfield was not called as witness nor was her absence explained in any manner; thus, what Dunleavy attributed to her was not directly contradicted.

Portugual on November 6 and boarded the *OMI Hudson* at Setubal, Portugual, on November 7, 1988.[17]

I find Dunleavy's testimony that he was not notified of his ARA assignment on November 4 to be suspect and unreliable. I also do not rely on his testimony that he perused Harper's November 3 letter telling him why he could not be on the Union's national shipping list before he sought an assignment through the ARA. I am not convinced that absent special mailing service, not shown to have been utilized here, that a letter would be delivered in 1 day by the United States Postal Service from Panama City, Florida, to Augusta, New Jersey. I reach the conclusions immediately set forth above because, among other things, the ARA routinely issues assignment slips to users of its services and the slip for Dunleavy reflects he was assigned to the *OMI Hudson* at 9:50 a.m. on November 4, 1988. Additionally, Union President Harper testified the Union was routinely notified of the ARA assignment to Dunleavy by the ARA on November 4, 1988. I am, however, persuaded Dunleavy made his telephone call to the union hall on November 4, 1988, and spoke with Holleyfield before he received his ARA assignment or before the Union had been notified of that assignment to Dunleavy. I am convinced that if Holleyfield had known of the ARA assignment she would have mentioned that fact to Dunleavy when she spoke to him or Harper would have joined that telephone conversation and told Dunleavy he knew Dunleavy had been given an assignment from the ARA. I do not find the minor time differences between the Union's telephone log of Dunleavy's call and the time reflected on the ARA assignment sheet to warrant a different credibility conclusion.

President Harper testified the November national shipping list was prepared at the close of business on November 7, 1988, and not on November 1, because that date fell on a Tuesday and the Union was still utilizing the previous weeks' national shipping list. He also stated another reason it was not prepared before November 7, 1988, was the Union had a real question concerning Dunleavy's

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[17] The assignment lasted until on or about December 8, 1988.

eligibility to be on its November national shipping list. Harper stated that even if the national shipping list had been prepared on November 1 no use could have been made of it prior to 5 p.m., on November 7. Harper testified he and Chief Dispatcher Debbie Thomas had "extensive discussions" about whether to include Dunleavy on the November national shipping list, but that he definitely did not make a decision on November 1 because he had until November 7 to do so. He however acknowledged that he and Thomas did, in fact, make a decision about Dunleavy's status on November 4, 1988, when the Union learned Dunleavy had accepted an assignment on the *OMI Hudson* from the ARA. Harper testified:

> [Thomas][18] reported to me that all our discussions were of no account because Mr. Dunleavy had been assigned to a ship and was not, under any circumstances, eligible to be on the [November] National Shipping List.

Harper said he "felt a great sense of relief" when he learned Dunleavy had accepted an assignment from the ARA, thus resolving the question of whether he would be listed on the Union's November national shipping list. He said it was the "invariable" practice of the Union not to include an individual on its national shipping list once such an individual had accepted an assignment of 14 days or more on a nonexempted ship such as the *OMI Hudson*. Harper testified the *only* reason Dunleavy was not included on the Union's November national shipping list was that he had accepted an assignment on a seagoing vessel and as such was not eligible to be included on the list. Harper testified that even if the list had been prepared on November 1, and even if Dunleavy had been included thereon, he would have been dropped from the list on November 4, 1988, because he had taken an assignment on the *OMI Hudson*.

The Union through its counsel submitted a letter of position to Region 15 of the Board on December 20, 1988, regarding the

---

[18] Thomas died shortly before the hearing.

Dunleavy case. In his letter counsel informed the Board's representative in pertinent part as follows:

> 1. Mr. Dunleavy has not been restored to the shipping lists because he is ineligible as a result of the fact that he has failed to pay a fine of $1,000 which was duly levied upon him for violation of Hiring Hall rules more than one year ago.
>
> . . . .
>
> 5. All members and non-members are required to pay all fines relating to violation of shipping rules in order to be placed on the shipping lists.
>
> 6. In the event that Mr. Dunleavy were to pay his $1,000 fine, he would thereby become eligible for listing on the shipping lists of the ROU provided that he comply with other applicable requirements which apply to all members and non-members.
>
> 7. Among other requirements is a limitation as to the total number of days which may be shipped in any year. Thus, for example, there is a mandatory limitation of 250 days. This limitation is established in order to achieve equal distribution of work. Since Mr. Dunleavy has been sailing during the period of suspension, the Hiring Hall is unaware of whether Mr. Dunleavy has taken the mandatory vacation time. It is appropriate, however, for the Hiring Hall to examine this question while it is clear that Mr. Dunleavy is ineligible because he has failed to pay his fine.
>
> 8. In addition, it is clear that Mr. Dunleavy would be violating the shipping rules if he were to once again ride the shipping list at the same time that he was riding the ARA shipping list and at the same time that he was seeking non-union assignments.
>
> It should be made clear, however, that none of these questions are appropriate to consider until Mr. Dunleavy has paid his fine for prior violation of the shipping rules.
>
> . . . .
>
> [51]cc: Thomas C. Harper, President, Radio-Electronics Officers Union:

Union President Harper testified his attorney's letter of position to the Board's representative outlined "nice reasons" for Dunleavy not being on the Union's November national shipping list, but the reasons listed by his attorney were not in fact those relied on the Union in excluding Dunleavy from its November national shipping list. Harper testified the conversation he had with his attorney and the information he provided to his attorney about Dunleavy's status all predated November 3, 1988. Harper, however, acknowledged he received a copy of his attorney's letter that was sent to the Board's representative.

First, I am persuaded the Union, and more specifically Harper, had decided by at least November 1, 1988, to exclude Dunleavy from its November national shipping list. I do not credit Harper's testimony to the contrary. First, the Union's shipping rules reflect "The National Shipping List will be updated monthly on the first business day of each month." The first business day of November was November 1, which fell on a Tuesday. The fact the list was to be updated on the first business day of the month, however, does not mean the list was effective on that date. Secondly, Harper in his November 3 letter to Dunleavy informed Dunleavy that Harper had sought legal advice and that Dunleavy was ineligible to be on the November national shipping list because he had, among other things, not paid a $1000 fine levied against him by the Union. Thirdly, Union Spokesperson Holleyfield told Dunleavy on November 4 he was not on the Union's November national shipping list. Accordingly, I conclude the list was, as required by the shipping rules, prepared on November 1 and that Dunleavy was not included on it. I also do not credit Harper's testimony that his attorneys' letter of position to the Board's representative on December 20, 1988, only provided the Board's representative with "nice but unrelied upon reasons" for excluding Dunleavy from the November national shipping list. In that regard, I note Harper "felt a great sense of relief" when Dunleavy took the ARA assignment that he asserts prevented Dunleavy from being on the November national shipping list. I find totally unbelievable Harper's testimony that he simply failed, prior to December 20, 1988, to advise his attorney of that fact—a fact he perceived to be controlling with respect to Dunleavy's eligibility to

be on the list. I also note that although Harper contends his attorney's letter was inaccurate he never attempted to correct any inaccuracies even though he admittedly received a copy of the letter at the time it was served on the Board's representative by his attorney.

I am persuaded counsel for the General Counsel established a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the Union's decision to exclude Dunleavy from its November 1988 national shipping list. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB. v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). First, Dunleavy was told as early as November 3 he was not on the Union's national shipping list. Secondly, he was told by Union Spokesperson Holleyfield on November 4, 1988, specifically that he was not on the November national shipping list. Thirdly, Union President Harper in a November 3, 1988 letter to Dunleavy spelled out to him that one of the reasons he was not eligible to be on the Union's November national shipping list was that he had not paid a $1000 fine the Union had levied against him. These factors establish counsel for the General Counsel's prima facie case. I find the Union has failed to demonstrate it would have excluded Dunleavy from its November national shipping list in the absence of his owing a fine to the Union or that he otherwise would have been excluded from its lists for legitimate reasons related to rules of the hiring hall. The Union's contention that Dunleavy accepted an ARA assignment and thus excluded himself from being eligible to be on its November national shipping list is without merit. As testified to by Dunleavy, he would not have been in the position of seeking work assignments outside the Union's hiring hall if he had not been told prior to doing so that he was not on the Union's November national shipping list. The Union's further arguments that it had other lawful reasons based on its shipping rules to exclude Dunleavy from its November national shipping list are also without merit. The Union asserts Dunleavy was in violation of its rule regarding radio officers taking mandatory vacation time and its rule regarding being advised concerning non-union job assignments. The Union's argument on these points is defeated by its

own handiwork. Union counsel in his letter of position to the Board on December 20, 1988, stated, "Mr. Dunleavy has not been restored to the shipping list because he is ineligible as a result of the fact he has failed to pay a fine of $1,000." Union counsel then addressed certain rule infractions attributed to Dunleavy by the Union but added in his letter of position, "It should be made clear, however, that none of these questions are appropriate to consider until Mr. Dunleavy has paid his fine for prior violation of the shipping rules." I find, in light of all the above, the Union has failed to meet its burden and further find the *sole* reason Dunleavy was excluded from the Union's November national shipping list was his failure to pay the $1000 fine in question. It is an unfair labor practice for a union operating an exclusive hiring hall with a union-security clause to refuse to refer or register for referral a member or user of its services for reasons other than a failure to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. Inasmuch as fines levied against members are not periodic dues, such fines may not be enforced by a union through a threat of a loss of employment or the actual denial of employment. I conclude and find the actions of the Union against Dunleavy violated Section 8(b)(1)(A) and (2) of the Act.

I shall leave to the compliance stage of this proceeding the Union's contention that Dunleavy worked the entire time covered by its November 1988 national shipping list and could not have lost employment opportunities attributable to it after the November 1988 national shipping list expired.

CONCLUSIONS OF LAW

1. Sea Land Service, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Radio-Electronics Officers Union (Radio Officers Union) is a labor organization within the meaning of Section 2(5) of the Act.

[52]3. By on or about April 1, 1988, removing Michael F. Harris from its referral lists because he failed to remain current in his dues without first informing him of his failure and the specifics related thereto and without affording him a reasonable opportunity to meet his obligations, the Union violated Section 8(b)(1)(A) and (2) of the Act.

4. By since on or about November 30, 1988, failing to demonstrate it allows delinquent dues payers a reasonable time to correct their deficiencies before removing them from its referral lists to the Union violated Section 8(b)(1)(A) and (2) of the Act.

5. By since on or about November 1, 1988, refusing to allow Harry Dunleavy to register for referral from its exclusive hiring hall because of his failure to pay a fine levied against him by the Union it has engaged in a discriminatorily hiring hall practice in violation of Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that the Union has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Union unlawfully refused to allow Dunleavy to register for referral, I shall recommend it be ordered to list Dunleavy on its next national shipping list and, on request from him, list him on any appropriate on-hand list that he requests to be listed on. I further recommend that the Union be ordered to make Dunleavy whole for any loss of wages and benefits he may have suffered as a result of the Union's refusing to allow him to register on its national shipping list on and after November 1, 1988. Inasmuch as I have found the Union unlawfully removed Michael F. Harris' name from its referral list, I shall recommend that he be listed on the Union's next national shipping list and that he be listed on any on-hand list that he specifically requests to be listed on. I also recommend the Union be ordered to make Harris whole for any loss of wages and benefits he may have suffered as

a result of his having been unlawfully removed from the Union's referral list on or about April 1, 1988. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and shall include interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1083 (1987).[19] Inasmuch as I have concluded that a reasonable time for dues payers to correct any deficiencies that might result in them being removed from the Union's referral list is 15 days, I shall not recommend that the Union rescind its bylaws in that regard but rather order that it not remove any delinquent dues payers from its referral lists without demonstrating such persons have been allowed a reasonable time (at least 15 days) to correct any deficiencies before removing them. Finally, it is recommended that the Union be ordered to post a notice to members attached as "Appendix" for a period of 60 days in order that members and users of its hiring hall may be apprised of their rights under the Act and the Union's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Union, Radio-Electronics Officers Union (Radio Officers Union), Panama City, Florida, its officers, agents, and representatives shall

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[19] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Removing Michael F. Harris' name from its referral lists for failure to remain current in his dues without first informing him of his failure and the specifics related thereto, and without affording him a reasonable opportunity to meet his obligations with respect thereto.

(b) Refusing to allow Harry Dunleavy to register for referral or referring him for work assignments in his rightful order of priority for reasons unconnected to his failure to tender and pay periodic dues, registration fees, and initiation fees, uniformly required as a condition acquiring or maintaining membership in the Union or as a condition required for using the Union's exclusive hiring hall system.

(c) Removing delinquent dues payers from its referral lists without first affording such delinquent persons a reasonable time to correct their deficiencies.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify Harry Dunleavy and Michael F. Harris that it has no objection to listing them for referral on its exclusive hiring hall lists in their rightful order of priority.

(b) Make Harry Dunleavy and Michael F. Harris whole for any loss of earnings they may have suffered because of the discrimination against them in accordance with the section of this decision.

(c) Post at its offices, meeting halls, and hiring halls copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 15,

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[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

after being signed by the Union's authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Union has taken to comply

[53]APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to register for referral Harry Dunleavy and Michael F. Harris in their rightful order of priority on our exclusive hiring hall lists for discriminatorily reasons.

WE WILL NOT remove delinquent dues payers from our exclusive hiring hall lists until they have been afforded a reasonable time (at least 15 days) to correct their deficiencies.

WE WILL NOT in any like or related manner restrain or coerce employees, members, or users of our exclusive hiring hall in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL make Harry Dunleavy and Michael F. Harris whole for any pay or benefits they may have suffered as a result of our discrimination against them.

RADIO-ELECTRONICS OFFICERS UNION

APPENDIX C

ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

12 May 1994

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1145 **September Term, 1993**

Radio-Electronics Officers
Union (Radio Officers Union)

v.

National Labor Relations Board

[Clerk's Stamp Omitted in Printing]

[FILED MAY 12, 1994]

BEFORE: Buckley, Ginsburg and Henderson, Circuit Judges

O R D E R

Upon consideration of the motion for leave to intervene of Michael Harris, the response thereto and of the reply, it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to file intervenor's petition for rehearing and suggestion for rehearing in banc. Upon consideration of the petition for rehearing, it is

FURTHER ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1145 **September Term, 1993**

Radio-Electronics Officers
Union (Radio Officers Union) **[Clerk's Stamp Omitted in Printing]**

v.

National Labor Relations Board **[FILED MAY 12, 1994]**

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

ORDER

Intervenor's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX D

ORDER OF THE SUPREME COURT

OF THE UNITED STATES

13 May 1994

Supreme Court of the United States

No.

A-935

Michael Harris,

Petitioner

v.

Radio-Electronics Officers Union (Radio Officers Union), et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 2, 1994.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 13th

day of May, 1994.

APPENDIX E

RELEVANT STATUTORY PROVISIONS

National Labor Relations Act:

§ 7, 29 U.S.C. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 8(a)(3), 29 U.S.C. § 158(a)(3)

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as

provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]

§ 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A)

§ 158. Unfair labor practices

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein[.]

§ 8(b)(2), 29 U.S.C. § 158(b)(2)

§ 158. Unfair labor practices

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]

Supreme Court, U.S.
FILED
JUL 29 1994
OFFICE OF THE CLERK

No. 94-1

(2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MICHAEL HARRIS,
Petitioner,

v.

RADIO-ELECTRONICS OFFICERS UNION, and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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July 1994

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IN THE

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OCTOBER TERM, 1994

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MICHAEL HARRIS,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

INTRODUCTION

The Court should deny the petition of Michael Harris ("Harris" or "Petitioner") because (1) Questions II and III presented by Petitioner are based on the incorrect premise that this case involves a "closed shop," although neither the National Labor Relations Board ("Board") nor the Court of Appeals found a "closed shop" and the record establishes that the Union's hiring hall was available to both members and non-members; (2) Question IV is similarly based on the erroneous assumption that this case involves a "union security agreement" when the Board specifically found, and the Court of Appeals affirmed, that there was no evidence of a union security agreement in the record; and (3) Questions I and V do

not raise "an important question of federal law,"[1] but merely ask this Court to second-guess the Court of Appeals' applicaiton of a clearly established and consistently applied rule that a union does not act arbitrarily when its actions are necessary to enforce nondiscriminatory provisions of a collective bargaining agreement.

STATEMENT OF THE CASE

Petitioner Michael Harris was a long time member of Respondent Radio-Electronics Officers Union ("ROU" or "Union"),[2] a labor union representing radio officers on oceangoing vessels. At the time Harris sought employment through the ROU hiring hall, the ROU Shipping Rules, which were part of its collective bargaining agreements with employers using the hall, required that members and non-members alike must be in "good standing," meaning that members must have paid their dues and non-members must have paid their service fee for the quarter for which they desired to register. (Pet. 3).[3] In written news letters, the ROU had warned members that they were required to be in good standing to remain on the shipping list. (Pet. 4).

When Harris failed to pay his second-quarter dues by April 1, 1988, the ROU's computer automatically removed him from the hiring list. (Pet. 4). Harris there-

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[1] Rule 10 of the Supreme Court Rules contains three bases for granting the writ. The first two (subparagraphs (a) and (b)), relating to "conflicts" between circuit courts or states' highest courts, are not asserted here. Petitioner thus must show that this case falls under subparagraph (c) which requires that the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court."

[2] The ROU is not a corporation pursuant to Rule 28.1 of the Supreme Court Rules. It is an unincorporated association and its parent body is the National Marine Engineers' Beneficial Association.

[3] "Pet." refers to Harris's Petition for a Writ of Certiorari and Appendix.

after filed an unfair labor practice charge, claiming that he should have been given individualized notice and an opportunity to cure before being dropped.[4]

An administrative law judge ("ALJ") held that the ROU had violated 29 U.S.C. §§ 158(b)(1)(A) and (b)(2). The ALJ based his decision on his factual finding that the ROU was enforcing a "valid union security clause," [5] and therefore under Board precedent Harris was entitled to individualized notice and an opportunity to cure before being dropped.

The Board rejected the ALJ's reliance on union security cases for the fundamental reason that there was "no evidence in the record of a union-security clause." (Pet. 7). Nonetheless, the Board affirmed the unfair labor practice finding, reasoning that:

> * * * whenever a union prevents an employee from being hired, it demonstrates its power and influence over his livelihood so dramatically as to compel an inference that the effect of the union's action is to encourage union membership on the part of all employees who have perceived the display of power. A union may overcome that inference, however, either by acting pursuant to a valid union-security clause or by showing that its action was necessary to the performance of its representative function.[6] The Respondent has failed to overcome that inference. There is no evidence of a union-security clause here, and the Respondent has not shown that removing Harris from the national shipping list in the manner it did was necessary to the effective performance of its representative function.

(Pet. 19a).

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[4] When the ROU adopted a new bylaw on November 30, 1988 requiring that dues be received 15 days prior to the end of the calendar quarter to permit registration, he filed a second charge. (Pet. 4-5).

[5] 306 N.L.R.B. at 47; Pet. 28a.

[6] *Operating Engineers Local 18*, 204 N.L.R.B. 681 (1973).

The Court of Appeals agreed with the Board that "a presumption of illegality arises whenever an employee loses * * * a hiring opportunity as a result of a union's conduct," and that to rebut this presumption "the union must show either that its action was taken pursuant to a valid union security clause, or that it 'was necessary to the effective performance of its function of representing its constituency.' " (Pet. 8a).[7] It noted, however, that both the Board and the Circuit Courts had consistently held that the "necessity" defense is met whenever (1) "a good-faith desire to abide by [the union's] contractual duties * * * prompted the action that led to the employee's * * * loss of a job opportunity" (citing, *Road Sprinkler Fitters Local Union No. 669, supra* at 12 and *United Bhd. of Painters, Local Union No. 487 (American Coatings, Inc.)*, 226 N.L.R.B. 299, 301 (1976)), or (2) the union acts "to enforce union administrative rules that are neutral, clearly established, and consistently applied," citing *e.g., Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988); *NLRB v. Ironworkers Local Union No. 505*, 794 F.2d 1474, 1478 (9th Cir. 1986); *Teamsters Local No. 519 (Rust Engineering)*, 276 N.L.R.B. 898, 902, 908 (1985). Because "Harris's automatic delisting for failure to pay dues was required by the Union's established hiring hall rules," the Court of Appeals concluded that the necessity defense was met and therefore reversed the Board's unfair labor practice finding.

Finally, the Court of Appeals rejected the Board's reliance on union security clause cases requiring a union to provide individualized notice of a delinquency and an opportunity to cure before seeking an employee's discharge for failure to pay union dues. It reasoned that:

> * * * the Board found no evidence of a union security clause in the Union's collective bargaining agree-

[7] Quoting, *Road Sprinkler Fitters Local Union No. 669 v. N.L.R.B.*, 778 F.2d 8, 11 (D.C. Cir. 1985).

> ments, and the Board does not dispute that the Union's hiring hall was open to non-members as well as members. Therefore, the rationale for a stringent notice standard is absent here, and the union security clause cases are inapposite.

(Pet. 11a).

REASONS FOR DENIAL OF WRIT

I. THIS CASE PRESENTS NO QUESTION INVOLVING A "CLOSED SHOP"

Questions II and III of Harris's petition are predicated upon the notion that the union in this case was running an "illegal closed shop." *See* Pet., Parts II and III, pp. 11-20. That premise, however, is pure fantasy. Neither the ALJ, the Board nor the Court of Appeals made a finding that the union was running a "closed shop." To the contrary, as is shown by the excerpt of the shipping rules quoted by Petitioner (Pet. 3), the hiring hall admittedly was open both to members and non-members alike. (Pet. 3). Far from operating a closed shop which (according to Petitioner's definition) restricts employment only to union members (Pet. 12, n.42), there was no evidence in this record of even a "union security clause," which would have compelled radio officers to become union members after being referred for employment.[8] Given these findings, and the absence in the record of evidence of either a closed shop or union security clause, Petitioner's arguments for the granting of the writ should be denied.

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[8] Petitioner concedes that the Board and the Court so found, but argues that those findings are not supported by substantial evidence. (Pet. 20). While quoting portions of the collective bargaining agreement in the record demonstrating that the hiring hall is the exclusive source of referrals (Pet. 20-21), Petitioner quotes no language which would require that every radio officer referred join the union—the *sine qua non* of a union security clause. (Pet. 12, n.42). In any event, this dispute as to the correctness of a factual finding hardly presents an issue worthy of this Court's consideration.

II. THIS CASE PRESENTS NO QUESTION INVOLVING A UNION-SECURITY CLAUSE

Question IV of Harris's petition asks the Court to decide whether parties to a collective bargaining agreement can evade a finding that a "union-security" arrangement exists by establishing that arrangement in a "separate document." As stated above, both the Board and the Court of Appeals explicitly addressed the issue of whether there was evidence in the record of a union-security clause, and both concluded that there was not. *See supra* at 3-5. Harris points to no such evidence, and the record shows that employees referred from ROU's hiring hall were not required to be union members, but that the hiring hall was open to members and non-members alike. To the extent that Harris now claims that the language of this specific contract was an "artifice" to avoid a finding of a union-security clause, that debate over the import of the contractual language is not worthy of the grant of certiorari.

III. THE "ARBITRARY CONDUCT" ISSUE ASSERTED BY PETITIONER MERELY SEEKS FURTHER REVIEW OF THE FACTS OF THIS CASE

In Question I of his petition, Harris contends that this case "squarely presents" an issue of construction of the National Labor Relations Act ("NLRA") "reserved" by this Court in *Breininger v. Local No. 6, Sheet Metal Workers*, 493 U.S. 67 (1989).[9] Question V raises the issue of whether "arbitrary" conduct by a union in the administration of the hiring hall violates the NLRA (Pet. 23), a question also arising from the duty of fair representation discussed in *Breininger*.

Petitioner strains to create seeming tension between the Board's opinion and the Court of Appeals' reasoning, suggesting that this divergence poses an important fed-

[9] Although Petitioner lists this question first, he devotes to it less than a half page of his thirty page brief.

eral question reserved by this Court in *Breininger* (*i.e.*, whether arbitrary conduct which violates the judicially created duty of fair representation necessarily amounts to an unfair labor practice under section 8(b)(1)(A) of the Act). The short answer is that the Court of Appeals did not hold that ROU's conduct, though arbitrary, was not an unfair labor practice. Rather, the Court of Appeals applied *exactly the same legal standard* followed by the Board in concluding that ROU's action was not arbitrary, but was necessary to enforcement of a "neutral, clearly established, and consistently applied" hiring hall rule that required all applicants to pay dues (or in the case of non-members, hiring hall fees) in advance in order to use the hiring hall. *See supra* at 4. That decision does not present the issue "reserved" in *Breininger*; rather, it involves no more than a routine application of a well-settled rule of law.

To the extent that Petitioner seeks to reach beyond *Breininger*, the issues which he raises go to the minutiae of this case, and do not confront the "important questions" that are essential for the granting of a petition. Thus, Harris argues that the conduct of the union toward him was "arbitrary" because even if he had "knowledge of the rule," he "might have inadvertently failed to mail his check." (Pet. 28). These are not the type of issues that should be offered to the Court on a petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1994

MICHAEL HARRIS, PETITIONER

v.

RADIO-ELECTRONICS OFFICERS UNION (RADIO OFFICERS UNION) AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1488

QUESTION PRESENTED

Whether the Union violated the National Labor Relations Act by removing petitioner from its job referral lists for nonpayment of dues.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1

MICHAEL HARRIS, PETITIONER

v.

RADIO-ELECTRONICS OFFICERS UNION (RADIO OFFICERS UNION) AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 16 F.3d 1280. The decision and order of the National Labor Relations Board (Pet. App. 15a-21a), including the decision of the administrative law judge (Pet. App. 21a-46a), is reported at 306 N.L.R.B. 43.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1994. Petitioner, who was not a party in the court of appeals, subsequently moved for leave to intervene and filed a petition for rehearing. On May 12, 1994, the court of appeals granted petitioner's motion to

intervene and denied the petition for rehearing. Pet. App. 47a-48a. On May 13, 1994, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 2, 1994. Pet. App. 49a. The petition for a writ of certiorari was filed on June 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Radio-Electronics Officers Union (Union) represents radio officers, radio electronics officers, and master radio electronics officers who work on vessels of the United States merchant fleet and other oceangoing freight vessels. Pursuant to collective bargaining agreements between the Union and various employers, the Union operates a hiring hall that serves as the exclusive source of job referrals for signatory employers. The Union operates the hiring hall under shipping rules that are incorporated into the collective bargaining agreements and the Union's bylaws. The shipping rules require individuals seeking referrals to make a written request for registration on a national shipping list, which establishes a ranking of eligible users of the hiring hall, and to make a separate request for placement on any of the Union's three on-hand lists, which establish the order of referral of jobs on the Atlantic, Gulf, and Pacific coasts. A user of the hiring hall must be on the national shipping list in order to be placed on the on-hand lists, from which all referrals are made. Pet. App. 16a-17a, 23a-24a.

Article 19, Section 1 of the shipping rules provides in relevant part:

> A member must be in good standing to be placed on the National Shipping List, and must remain so to continue his employment. Non-members must pay

> the current quarterly service fee to be placed on the National Shipping List and must continue to pay the quarterly service fee during the period of their employment.

Pet. App. 24a.

On March 15, 1988, petitioner, a long-time union member, wrote the Union to request placement on the Atlantic coast on-hand list, and the Union complied with that request. Petitioner failed to pay his quarterly union dues, however, which were due on or before April 1. By computer-generated action on April 1, the Union automatically removed petitioner's name from the national shipping list for nonpayment of dues. The Union sent petitioner a letter notifying him of that action and advising him to reregister after making payment. As a result, petitioner was rendered ineligible for referral from the hiring hall. Pet. App. 17a, 25a-26a. Although the Union did not notify petitioner of his delinquency before removing his name from the national shipping list, during the preceding year the Union had sent petitioner and all other union members monthly newsletters, several of which specifically reminded the recipient of a member's obligation under the shipping rules to remain current in union dues, and of the consequences of failing to do so. The newsletters, such as one sent in April 1987, warned (*id.* at 26a-27a):

> NINE MEMBERS WERE DROPPED FROM THE APRIL NATIONAL SHIPPING LIST FOR NON-PAYMENT OF DUES. MEMBERS ARE REQUIRED TO BE IN GOOD STANDING TO GET ON THE LIST. AND THEY ARE REQUIRED TO BE IN GOOD STANDING TO STAY ON THE LIST. THE COMPUTER IS MERCILESS, AND EVEN IF YOU ARE

> NUMBER 1 WHEN YOU GET BEHIND IN PAYMENT OF DUES, YOU WILL BE DROPPED FROM THE LIST IMMEDIATELY. THE BEST WAY TO AVOID THIS IS TO PAY BY THE YEAR.

In November 1988, the Union adopted a new bylaw requiring dues "to be received by the Union at least fifteen days prior to the end of each calendar quarter," and conditioning members' ability to register on the shipping lists on the Union's timely receipt of dues. Pet. App. 31a. The Union's practice under that bylaw was to send a written notice to delinquent dues payers at some point between 15 days before the beginning of the new quarter and its actual start advising them of a delinquency and warning them of the consequences of failing to make a timely payment. *Id.* at 31a-32a.

2. In June and December 1988, petitioner filed unfair labor practice charges alleging that the Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (Act), 29 U.S.C. 158(b)(1)(A) and (2), by removing his name from the national shipping list and by maintaining the November 1988 bylaw. Pet. App. 21a-22a. After a hearing, the administrative law judge (ALJ) found that the Union unlawfully removed petitioner from the national shipping list for nonpayment of dues because it did not first notify him of his delinquency and afford him a reasonable opportunity to cure it. *Id.* at 30a-31a. The ALJ also concluded that the Union's November 1988 bylaw was unlawful as implemented, in that the Union failed to demonstrate that its notification system actually afforded delinquent dues payers 15 days' advance notice within which to cure their delinquencies. *Id.* at 33a. In so holding, the ALJ assumed that the relevant collective bargaining agreements contained a valid union security clause. *Id.* at 27a & n.6.

The Board affirmed the ALJ's conclusions, but on a different ground. Pet. App. 20a. The Board explained that the operator of an exclusive hiring hall owes users a duty of fair representation, which includes an obligation to operate the hall in a manner that is not "arbitrary or unfair." *Id.* at 19a. The Board noted that when a union prevents an employee from gaining employment through an exclusive hiring hall, "it demonstrates its power and influence over his livelihood so dramatically as to compel an inference that the effect of the union's action is to encourage union membership." *Ibid.* The Board observed that a union can overcome that inference by showing either that it acted pursuant to a valid union security clause or that its action was necessary to the performance of its representative function. *Ibid.*

The Board found that the Union could not justify its conduct by reference to a union security clause, because (contrary to the assumption made by the ALJ) there was no evidence that any collective bargaining agreement providing for the operation of the hiring hall contained a union security clause. The Board further found that the Union had not established that dropping petitioner from the national shipping list without first giving him specific notice of the dues he owed and a reasonable opportunity to remit payment was "necessary to the effective performance of its representative function." Pet. App. 19a. Having found that the Union breached its duty of fair representation, thereby violating Section 8(b)(1)(A), Pet. App. 20a, the Board ordered the Union to place petitioner's name on the next national shipping list and any of the on-hand lists on which he requested placement, and to make him whole for any lost wages and benefits he suffered as a result of the Union's action. *Id.* at 43a-44a.

3. The court of appeals declined to enforce the Board's order.[1] Pet. App. 14a. The court agreed with the Board that "[t]he presumption of illegality undoubtedly applies to the Union's delisting of [petitioner]." *Id.* at 10a. The court also agreed with the Board that, because its collective bargaining agreements did not contain a union security clause, "the only question * * * is whether the Union has rebutted the presumption by establishing a necessity defense." *Ibid.* The court, however, concluded that the Union had successfully made out that defense.

The court found that the Union applied its rule requiring deletion from the national shipping list of the names of all delinquent dues payers automatically and uniformly. Pet. App. 10a. The court also found it reasonable to infer that petitioner was aware of the Union's practice, given that the monthly newsletters confirmed that delisting was "the automatic effect of any delinquency," and that petitioner, "a seasoned mariner who depended on the hiring hall for his livelihood," was unlikely to have been "oblivious of the consequences of failing to pay his dues on time." *Ibid.* Finally, the court concluded that, since there was no evidence of a union security clause in the Union's collective bargaining agreements, and no dispute that the Union's hiring hall was open to nonmembers as well as members, the Union was not required to give petitioner explicit notice of his

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[1] In addition to its finding respecting petitioner, the Board, in agreement with the ALJ, found that the Union had unlawfully refused to register another employee, Harry Dunleavy, on the national shipping list because he had not paid a Union fine. Pet. App. 16a n.2, 42a. The court of appeals affirmed that portion of the Board order. *Id.* at 14a. The Union does not seek review of that aspect of the decision below.

delinquency and an opportunity to take corrective action before removing him from the national shipping list. *Id.* at 11a.

ARGUMENT

The disagreement between the Board and the court of appeals turns on the question whether, in the circumstances of this case, it was necessary for the Union to give particularized notice to petitioner of the consequences of his nonpayment of dues before removing him from the hiring hall referral list. That issue does not merit this Court's review. Nor, contrary to petitioner's contention, does the case raise any other issue worthy of this Court's attention.

1. In *Local 357, Int'l Bhd. of Teamsters* v. *NLRB*, 365 U.S. 667, 674-677 (1961), this Court held that the use of a union hiring hall as the exclusive source of job referrals does not constitute discrimination within the meaning of the Act, provided that the hiring hall is open to both members and nonmembers and that there is no showing of discrimination against nonmembers. The operator of an exclusive hiring hall, however, owes a duty of fair representation to the users of the hall, and that duty includes an obligation to operate the hall in a manner that is not "arbitrary and discriminatory." *Breininger* v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 88 (1989).

The Board found here that the Union acted arbitrarily and unfairly by removing petitioner from its referral registers and by applying its November 1988 bylaw in a way that denied him sufficient time to cure his dues delinquency before striking him from the registers. Pet. App. 19a. The court of appeals applied the same framework of analysis as the Board, see *id.* at 7a-8a, but held that, in the circumstances of this case, the Union

did not act arbitrarily by removing petitioner from the national shipping list before notifying him of and affording him an opportunity to cure the delinquency, because petitioner, a long-time union member, in fact knew of his obligation to remain current in payment of dues and had been repeatedly reminded by union publications that dues delinquency would result in automatic removal from the referral lists.

The Board believes that the court of appeals should have accepted its finding that the Union acted arbitrarily in failing to give petitioner specific notice of, and an opportunity to cure, his dues delinquency. The Board did not file its own petition for a writ of certiorari, however, because the issue dividing the Board and the court (that posed by Question V of the petition, see Pet. ii) essentially turns on the inferences to be drawn from the record in this case. The court of appeals' resolution of that issue does not warrant this Court's review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

There is no merit to petitioner's contention (Pet. 11) that the court of appeals "squarely rejected" the Board's interpretation of Section 8(b)(1)(A) and (2) of the Act as precluding "unfair, irrelevant, or invidious considerations in employee referrals of employees," and that this case therefore presents an issue left open in *Breininger*, 493 U.S. at 85 n.9. The court of appeals did not hold that a union may operate a hiring hall by the use of unfair, irrelevant, or invidious criteria. Rather, the court evaluated the same factors considered by the Board in determining whether a union has breached its duty of fair representation in the operation of a hiring hall, Pet. App. 10a, but reached a different conclusion in the

circumstances here.[2] Significantly, in the court of appeals, petitioner contended merely that the court "misapplied" *Universal Camera Corp.* in rejecting the Board's holding. Pet. for Reh'g at 3.

2. Petitioner contends (Pet. 13-15, 21-23) that the Union's hiring hall constituted a closed shop because he was required to maintain union membership in good standing in order to remain on the referral registers. As an initial matter, that claim was not raised in or addressed by the court of appeals. While petitioner did not intervene in the case until after the court of appeals issued its decision, petitioner did not present his claim of a "closed shop" in his petition for rehearing. In these circumstances, there is no basis for deviation from the "normal policy" of not considering issues initially presented to this Court. *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

In any event, petitioner's claim lacks merit. As noted above, *Local 357* holds that vesting the union with exclusive authority to refer applicants for employment does not constitute unlawful discrimination under the Act so long as the hiring hall is open to members and nonmembers and the union does not discriminate against nonmembers. The Board, upheld by the court of appeals, found, and petitioner concedes (Pet. 3), that the hiring hall was open to members and nonmembers alike. Petitioner, as well as any other member, had the option

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[2] The court did find, in contrast to the Board, that, given the lack of a union security clause and the openness of the hiring hall to union nonmembers and members, "the rationale for a stringent notice standard [accepted by the Board] is absent here." Pet. App. 11a. But the court ultimately viewed the Union's newsletters and petitioner's longstanding membership as proxies for actual notice, as they supported the inference that petitioner was aware "of the consequences of failing to pay his dues on time." *Id.* at 10a.

of foreswearing union membership and using the hiring hall as a nonmember on the same basis as every other referent simply by paying the referral fee required of nonmembers.[3] Accordingly, there is no basis for concluding that use of the referral system here was limited to union members in good standing.

Nor is there any other basis in this record for concluding that the Union's hiring hall arrangement constituted either a "closed shop" that restricted employment opportunities to the union members in good standing, or a "union shop" that required job applicants to become and remain union members in good standing after employment. The Board, upheld by the court of appeals, found that, although the collective bargaining agreement provided that referrals for employment would be processed exclusively through the Union's hiring hall, the record failed to establish that the contract contained a union security provision that conditioned employment on union membership, or its subsequent attainment. That fact-specific finding does not warrant review here.[4]

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[3] The shipping rules require that nonmembers pay the "current quarterly service fee" in order to use the hiring hall. Pet. App. 24a. The record does not disclose the amount of that fee. No contention was made in this case that the fee charged nonmembers exceeded the pro-rata expense of operating the hiring hall. Cf. *Morrison-Knudsen Co.*, 291 N.L.R.B. 250 (1988).

[4] The court of appeals did not rule, as petitioner claims (Pet. 22), that "no 'union-security' agreement exists unless it is an explicit part of a collective-bargaining agreement." The court, like the Board, simply noted that there was no evidence of a union security agreement. Pet. App. 11a, 18a. No party introduced any collective bargaining agreement into evidence or presented testimony on the subject. And, petitioner cites no language in the Union's shipping rules requiring individuals to join the Union as a

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1994

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condition of obtaining or maintaining employment with employers covered by the agreement.

Supreme Court, U.S.
FILED
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No. 94-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL HARRIS,
Petitioner,

v.

RADIO-ELECTRONICS OFFICERS UNION, and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Supreme Court of the United States

Rule 15.6 1

IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioner Michael Harris hereby responds to the briefs in opposition of respondents Radio-Electronics Officers Union ("ROU")[1] and National Labor Relations Board ("NLRB")[2].

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[1] Brief in Opposition, hereinafter cited as "ROU Br".

[2] Brief for the National Labor Relations Board in Opposition, hereinafter cited as "NLRB Br".

ARGUMENT

The issue worthy of a writ of certiorari that Harris presents is whether the "closed shop" is, after all, illegal under the National Labor Relations Act ("NLRA")—or whether it can be perpetuated by the sleights of hand of draftsmen of collective-bargaining agreements. Specifically, the issue is whether, as applied to Harris in this case, the ROU's shipping rules violate NLRA §§ 8(a)(3), 8(b)(1)(a), and 8(b)(2)—because those rules (i) amount to an "illegal 'union-security' arrangement" (a "closed shop") through their explicit incorporation into the ROU's collective-bargaining agreements, or (ii) are "arbitrary" in their operation. The ROU and its new-found teammate, the NLRB, tip-toe around this issue with factual misstatements and legal errors.

I. The NLRB pretends that Harris "did not present his claim of a 'closed shop' in his petition for rehearing" in the Court of Appeals.[3] This is a two-fold misrepresentation.

A. Whether the shipping rules incorporated into the ROU's collective-bargaining agreements constitute a "union-security agreement" was manifestly an issue before the ALJ (who found that they did) and the NLRB and the Court of Appeals (who inexplicably held that they did not).[4] That no one used the very term "closed shop" *in haec verba* to describe the intended and unavoidable effect of the rules on Harris is irrelevant. The general term "union-security agreement"—which the ALJ, the NLRB, and the Court of Appeals repeatedly used—includes numerous specific arrangements, including the "closed shop".[5]

B. In the Court of Appeals, Harris denounced the shipping rules as "an unlawful union-security arrangement" that "requires applicants, such as Harris, to be in good standing **before referral**

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[3] NLRB Br at 9.

[4] *See* Petition for a Writ of Certiorari ("Petn") at 6, 7 & n.25, 9 & n.29.

[5] Petn at 12 & n.42.

takes place", contrary to the rule that " '[f]ull union membership no longer can be a requirement of employment' ".[6] This is a challenge to the "closed shop", by definition.

II. Realizing that Harris has exposed its game, the ROU dissembles, saying that "the ROU Shipping Rules * * * required that members *and non-members alike* must be in 'good standing,' meaning that members must have paid their dues and non-members must have paid their service fee".[7] "Alike" has nothing to do with it. The rules mandate that "[a] *member* must be *in good standing* to be placed on the National Shipping List."[8] This *pre*-hire condition is a classic "closed-shop" arrangement: the erstwhile "member" must be such (*i.e.*, "in good standing", a term typically used to mean *full, current, and paid-up institutional membership* in a union) *before* he can even apply for employment through placement on the shipping lists.[9]

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[6] Petition for Panel Reconsideration and Suggestion for Reconsideration *En Banc*, No. 92-1145 (D.C. Cir.), at 11-12 (**bold-face emphasis** supplied), *citing Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 (1985).

[7] ROU Br at 2 (emphasis supplied).

[8] Petn at 2a, 24a (emphasis supplied).

[9] "Non-members must pay the current * * * fee" before they can be hired. Petn at 2a, 24a. This is a modified "closed shop", in which "membership" is whittled down to its financial core. *Cf. Communications Workers v. Beck*, 487 U.S. 735, 745 (1988). Thus, the ROU is inadvertently correct to refer to "members and non-members alike". For both members and nonmembers are subject to equally illegal (albeit substantively different) "closed-shop" arrangements—unless the "service fee" the ROU charged nonmembers did in fact represent its *pro rata* cost of administering the hiring hall.

The NLRB says that "[t]he record does not disclose the amount of [the 'service fee']", or that it "exceeded the pro-rata expense of operating the hiring hall". NLRB Br. at 10 n.3. However, the ROU admitted that "[m]embership dues for those not actively employed aboard ship and the quarterly service fee for non-members are equal". Brief in Support of Respondent's Exceptions, Case Nos. 15-CB-3488-2, 15-CB-3469-3, and 15-CB-3458 (NLRB, Region 15), submitted 15 June 1990, at 4. Moreover, the ROU's Labor Organization Annual Report Form LM-2 for 1988, the year Harris was denied referral, (on file with the Department of Labor and judicially noticeable) shows under the heading "Fees other than dues

III. Desperate to concoct an excuse for this Court not to consider the "closed-shop" issue so fatal to the ROU (and other unions of similar bent), the NLRB asserts that "there was no evidence of a union security agreement. * * * No party introduced any collective bargaining agreement into evidence or presented testimony on the subject".[10] This is obfuscation as deliberate and obvious as it is sorry.

A. In this Court, both the NLRB and the ROU *admit* that the ROU's shipping rules "are incorporated into the collective bargaining agreements" and "were part of [the ROU's] collective bargaining agreements".[11]

B. The opinions of the ALJ, the NLRB, and the Court of Appeals unanimously confirm these admissions.[12]

C. Even more compellingly, the ROU *judicially admitted* precisely this in its answer to the unfair-labor-practice charges:

> admits and alleges that ROU and various employer associations and employers * * * are parties to a Trust Agreement entitled the ROU Joint Employment Committee * * * . The trustees of the ROU Joint Employment Committee have designated the ROU to act as agent of the Joint Employment Committee in administering the Hiring Hall. *The Hiring Hall operates under shipping rules which are the result of Collective Bargaining Agreements*

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required from transfer members" the entry "N/A", and under the heading "Regular dues or fees or other periodic payments required to remain a member of the reporting labor organization (per year, mo., etc.)", shows "$300 per year". The demand on Harris for "second quarter dues" in advance was $75, exactly one-fourth of yearly dues, and not a lesser amount arguably representing only the pro-rata costs of operating the hiring hall.

[10] NLRB Br at 10 n.4.

[11] NLRB Br at 2; ROU Br at 2.

[12] *See* Petn at 2 & nn.6, 8; 20-21 & nn.69-71.

> *between ROU and various employer associations and employers. Such shipping rules are also incorporated into the By-laws of the ROU so that changes in the shipping rules require adoption of referenda by the members of the ROU as well as collective bargaining approval on behalf of various employer associations and employers and no such changes become effective until approved both by referenda and through collective bargaining.*[13]

Thus, the absence of redundant "evidence" and "testimony" is not surprising. No "evidence" or "testimony" was necessary after the ROU formally admitted that the shipping rules are "approved * * * through collective bargaining".

That the collective-bargaining agreements contain no clause explicitly entitled "union-security agreement" (the absence of which befuddled the NLRB and the Court of Appeals below)—or even labelled "illegal closed-shop scheme" (which the NLRB now suggests is necessary for the imposition of liability[14])—is beside the point. The record is pellucidly clear that: (i) the National Shipping List Rules are incorporated in the collective-bargaining agreements; and (ii) the rules denied Harris the opportunity to seek employment

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[13] Answer of Radio-Electronics Officers Union District 3, NMEBA, AFL-CIO ("ROU"), Case Nos. 15-CB-3458 & 15-CB-3469-3 (NLRB, Region 15), submitted 10 February 1989, Answer No. 3, at 1-2 (emphasis supplied). This Answer is "G[eneral] C[ounsel] Exh[ibit] 1(x)" in the NLRB's hearing record.

See also Brief in Support of Respondents' Exceptions, Case Nos. 15-CB-3488-2, 15-CB-3469-3, & 15-CB-3458 (NLRB, Region 15), submitted 15 June 1990, at 12 ("the record shows that ROU was enforcing a neutral hiring hall rule, which *is* part of ROU's collective bargaining agreements")(emphasis in the original); *and* Counsel for General Counsel's Answering Brief in Response to Respondent's Exceptions to the Decision of the Administrative Law Judge, Case Nos. 15-CB-3487, 15-CB-3488-1-2, 15-CB-3458, & 15-CB-3469-3 (NLRB, Region 15), submitted 19 July 1990, at 3-4 ("employers are party to collective-bargaining agreements with Respondent, which contain shipping rules which mandate that union members and non-member users of Respondent's exclusive hiring hall must be current in the payment of their dues and fees in order to * * * continue their registration on Respondent's shipping lists").

[14] *See* NLRB Br. at 10.

based solely upon his *pre*-employment lack of membership "in good standing" in the ROU. If this does not amount to a "closed shop", then nothing does.

Willfully blind to this obvious reality, the NLRB claims that Harris "cites no language in the Union's shipping rules requiring individuals to join the Union as a condition of obtaining or maintaining employment with employers covered by the agreement".[15] Amazing disgrace! Section 1 of the rules says that "[a] member must be in good standing to be placed on the National Shipping List".[16] Inasmuch as referral for employment depends upon prior placement on the list, this language "requir[es] individuals to join"—or maintain their membership in—the union (*i.e.*, "be in good standing") "as a condition of obtaining * * * employment". Section 1 goes on to say that a member "must remain so [*i.e.*, 'in good standing'] to continue his employment". This, plainly, is "a condition of * * * maintaining employment". That the NLRB refuses to admit as much shows how abjectly it has abjured its duties to protect Harris' rights, and how cavalierly it disregards its responsibilities of candor and fair argument to this Court.

Thus, as impotent as they are deceptive are the arguments of the ROU that "the correctness of a factual finding [as to whether there was a union-security agreement or not] hardly presents an issue worthy of this Court's consideration", and that "debate over the import of the contractual language is not worthy of the grant of certiorari".[17] No "*factual* finding" is in dispute, only a question of the legal effect that must be given to the *undisputed* operation of the shipping rules as applied here. The importance of this question to all employees subject to the NLRA is self-evident: For the Court of Appeals' error has licensed the ROU—and every other union

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[15] NLRB Br at 10-11 n.4.

[16] Petn at 2a.

[17] ROU Br at 5 n.8, 6.

running or desirous of running a "closed shop" through a hiring hall[18]—effectively to nullify NLRA §§ 8(a)(3) and 8(b)(2) by the simple device of not labelling a "closed-shop" scheme as the "union-security" arrangement it undeniably is. Apparently, in the longed-for world of the ROU and its new-found henchman the NLRB, with the Court of Appeals' acquiescence, a thorn by some other name becomes a rose!

IV. The once adversaries but now complicitors then join hands to assault Harris' claim that he was subject to a "closed shop" through the operation of the shipping rules.

A. The ROU complains that Harris "quotes no language which would require that every radio officer referred join the union—the *sine qua non* of a union security clause".[19] The complaint is groundless. *First*, the explicit language of the portion of Section 1 of the rules that deals with members requires that "every radio officer referred" *must* "join" (or maintain his membership in) the union ("be in good standing") before being placed on the shipping lists—which placement is the condition precedent to employment. Second, even were the "closed-shop" language of the rules ignored, as actually applied the rules operated to require Harris' membership "in good standing" as a precondition to referral for employment—the *sine qua non* of the "closed shop", whether enforced against one employee or one thousand.

B. The ROU also argues that "the hiring hall admittedly was open both to members and nonmembers alike".[20] In lockstep, the NLRB adds that Harris, "as well as any other member, had the

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[18] *See Breininger v. Local No. 6, Sheet Metal Workers*, 493 U.S. 67, 89 (1989): "An improperly functioning hiring hall thus resembles a closed shop, " 'with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union.' "

[19] ROU Br at 5 n.8.

[20] *Id.* at 5.

option of foreswearing union membership and using the hiring hall as a nonmember on the same basis as every other referent simply by paying the referral fee required to nonmembers. Accordingly, there is no basis for concluding that use of the referral system here was limited to union members in good standing".[21]

First, Harris never argued that "the referral system here was limited to union members in good standing", only that *he* was denied an opportunity for employment because he was not "in good standing" (*i.e.*, a union member) prior to hire. Harris submits that NLRA §§ 8(a)(3) and 8(b)(2) protect an *individual's* rights against "closed-shop" impositions: a *single* instance of denial of employment because of an individual's *pre*-hire failure to obtain or maintain membership "in good standing" is an unfair labor practice. Self-evidently, if the individual is not protected, groups of individuals are not protected either. The ROU and the NLRB, however, implicitly argue that the NLRA protects only some "collective" right: a "closed-shop" practice must be applied *universally* to all employees before any one employee may complain. But respondents proffer no authority for this proposition. And the law is to the contrary.[22]

Second, particularly obnoxious is the NLRB's notion that Harris has only himself to blame, because he could have become a nonmember and been referred for employment simply by paying the ROU's "service fee". The ROU had a duty not to impose "closed-shop" conditions *on Harris*, even if it treated every other radio officer properly, and under other circumstances would have treated Harris properly. In any event, there is no basis for claiming that the ROU imposed "closed-shop" arrangements against members but not against non-members. The "dues" and "fees" were the same for both.

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[21] NLRB Br at 9-10 (footnote omitted).

[22] *See Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74-76 (1991) (not necessary to prove discrimination among employees to establish violation of the duty of fair representation).

V. Finally, the NLRB contends that "whether * * * it was necessary for the Union to give particularized notice to [Harris] of the consequences of his nonpayment of dues before removing him from the hiring hall referral list * * * does not merit this Court's review".[23] Whether a union should give particularized notice to employees where it collects "service fees" from them did merit this Court's plenary review in *Chicago Teachers Union, Local No. 1 v. Hudson*[24], however—a case in which the "consequences" to the affected employees was only the payment of small sums of money, not the loss of a major job-opportunity, as Harris suffered. If "particularized notice" in the labor-relations area should ever arouse judicial concern it is precisely and compellingly *where the absence of notice can doom the worker to unemployment*. Therefore, even more than in *Hudson*, review is warranted here; for the issue of "notice" is parallel, and the consequences of lack of notice to the affected employee far more severe.

CONCLUSION

Try as they may, the ROU and the NLRB cannot disguise the factual record in this case, or avoid the strictures of the law prohibiting the "closed shop". Moreover, that the ROU and the NLRB have suddenly found common ground from which to strike at Harris—and all other employees victimized by "closed-shop" schemes—should cause this Court grave concern over the NLRB's motives, and highlight the need for plenary review here.

Only those adept at political mindreading could fathom why the NLRB protests that this case involves no "closed shop" when it obviously does, and that the issue of "particularized notice" from the ROU does "not merit this Court's review",[25] even though the

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[23] NLRB Br at 7.

[24] 475 U.S. 292 (1986).

[25] NLRB Br at 7.

consequence of no notice was Harris' loss of employment.[26] But if a decision of a Court of Appeals effectively licensing unions to operate hiring halls as illegal "closed shops", coupled with the turncoat plea of the NLRB to look the other way, does not "merit this Court's review", then little could in the area of labor-relations law.

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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[26] Since its original decision in Harris' favor, the composition of a majority of the NLRB has changed; and the NLRB's General Counsel who prosecuted the case on behalf of Harris has been supplanted. As its brief shows, the "new" NLRB is ready to abandon an employee even where there is "substantial evidence"—and more than "substantial evidence"—in the record in his favor, and even though that abandonment requires the NLRB to jettison its long-held institutional position on the "substantial-evidence rule". *See* NLRB Br. at 8 (NLRB willing to accept Court of Appeals' contrary reading of factual record, notwithstanding rule of *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951)). That the "new" NLRB is ready to sacrifice its own institutional interests, as well as employees' rights, in order to perpetuate "closed-shop" schemes shows how disconnected the NLRB's position is from effectuating the true purposes of the NLRA.